Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

GRAND RAPIDS PLASTICS, INC.,

Petitioner,

v.

CRAIG M. LAKIAN, JAMES CHAPMAN, H&L ENGINEERING, INC., AND PINE RIVER PLASTICS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS FOR REVIEW

1. Whether in a Robinson-Patman Act case, the "continuing wrongful acts doctrine" of Zenith Radio v Hazeltine Research, Inc., 401 U.S. 321 (1971), permits a claim to become time-barred while illegal payments continue to be made, and the original scheme is expanded to new transactions between the original parties.

2. Whether a court may, *sua sponte*, dismiss claims on the basis of statute of limitations, against a party who never raised limitations as a defense.

PARTIES

Grand Rapids Plastics, Inc., Plaintiff/Appellant and Petitioner. Grand Rapids Plastics, Inc., a Michigan corporation, has no corporate parent and no non-wholly-owned subsidiaries.

Craig M. Lakian, an individual, Defendant

James Chapman, an individual, Defendant

H&L Engineering, Inc., a Michigan corporation, Defendant

Pine River Plastics, Inc., a Michigan corporation, Defendant

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Grand Rapids Plastics, Inc. v. Lakian, *et al.*, No. 96-CV-73615-DT (E.D. Mich., May 13, 1998)

CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The District Court's decision was not reported. The Appellate Court opinion was reported at 188 F.3d 401 (1999). Both opinions are reprinted in the Appendix. Also reprinted in the Appendix is the District Court's opinion denying Petitioner's motion for reconsideration.

BASIS FOR JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit entered August 12, 1999. This petition is timely filed within 90 days of that date as provided by Rule 13. Jurisdiction of this Court is founded on 28 USC §1254(1).

STATUTORY PROVISION INVOLVED

This case involves the following statute of limitations, 15 U.S.C. §15b, which applies to private actions brought under 15 U.S.C. §13(c) of the Robinson-Patman Act:

> **§15b. Limitation of actions**
>
> Any action to enforce any cause of action under section 4, 4A, or 4C [15 U.S.C.S. §§15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

STATEMENT OF THE CASE AND DISTRICT COURT JURISDICTION

Petitioner Grand Rapids Plastics ("Petitioner") seeks to enforce the Robinson-Patman Act's proscription against the payment of bribes to customer representatives. Petitioner is an auto parts manufacturer. The parties defendant are:

> Craig Lakian: A representative of automotive supplier Daikyo-Decoma who took bribes on work his company placed with Pine River Plastics at his recommendation.
>
> James Chapman: A sales representative under contract with Pine River Plastics who used his commissions on Daikyo-Decoma work awarded to Pine River Plastics to bribe Lakian.
>
> H&L Engineering, Inc.: Mr. Chapman's company, wholly owned by him.
>
> Pine River Plastics: Chapman and H&L's principal, and a competitor of Petitioner in the automotive parts manufacturing market, Pine River Plastics ("PRP") was

awarded several significant parts programs by Daikyo-Decoma and its successor company, "DDM," on which its sales representative Chapman paid Lakian bribes. Pine River's actual knowledge of the kickback scheme is in dispute.

The original scheme to pay Mr. Lakian bribes in exchange for his recommendation of Pine River Plastics was formulated in 1989. The payment of bribes was directly linked, and indeed was calculated based upon, the production and delivery of parts by Pine River to Daikyo-Decoma. Thus, award of the parts alone was insufficient to trigger a bribe. Initially, the scheme related to what is called the "transfer work," work that Daikyo-Decoma's corporate parent, Decoma International, had been manufacturing on its floor. The transfer work continued to 1992.

Subsequently, however, Pine River Plastics was awarded three additional programs by Daikyo-Decoma/DDM:

1992 Model Year Work: This work was bid by Pine River in 1990 and rebid in 1991, but did not go into production until 1992. It stayed in production until 1998.

1994 European Model Year Work: Bid in 1992, it did not go into production until 1994. It was still in production in 1997.

1998 Model Year Work: This work was bid in 1994 and awarded in 1995. It went into production in 1998.[1]

Petitioner has amassed substantial evidence that its bid on the 1998 model year work was more competitive than PRP's, and that it was recognized as a higher quality provider. Moreover, a Daikyo-Decoma employee, Doug Clements, testified that normal bid evaluation procedures

[1] Automotive programs are awarded on the assumption that the automobile that the program is a part of will move into production, but this does not always happen. If the car's production is canceled, no purchase orders will ever be issued on the program, no parts will be made, and no commissions will be paid. Commissions are paid only after purchase orders are filled.

on the 1998 model year work were not followed at Daikyo-Decoma.

Lakian was actually paid bribes on the 1990 transfer work, the 1992 model year work, and the 1994 model year work. He was slated to receive additional bribes, but in 1994, Chapman took a buyout, accepting a series of payments in lieu of future commissions, which he split with Lakian. The final lump sum payment to Lakian was made in 1995. Lakian received at least $300,000 between 1990 and 1995.

Many facts in dispute are not relevant to the legal issues framed in this petition. By way of example, Defendants argue that Lakian left the Daikyo-Decoma family shortly after the 1990 transfer work was awarded. Petitioner points out that Lakian's bribes were paid into his proprietorship "Kan Pei" (pronounced "can pay"), and were funnelled from there to Daikyo-Decoma's Steven Shinoda. Petitioner's Executive Vice President, Fred Blackstone, testified that Lakian

told him he needed money to pay Shinoda when Lakian solicited a similar bribe from Blackstone in 1992. Blackstone refused.

Petitioner brought this case in the Eastern District of Michigan on June 26, 1996, claiming *inter alia*, a violation of 15 U.S.C. §13(c) of the Robinson-Patman Act. Jurisdiction was based upon a federal question under 28 U.S.C. §1331.

Defendant Craig Lakian answered both the original and first amended complaints without asserting an affirmative defense of limitations. When the other Defendants filed motions based upon limitations, Lakian did not join them, or seek to amend his complaint to assert this affirmative defense.

The district court granted the other Defendants' motions on the basis of limitations, and dismissed the claims against Lakian as well, *sua sponte*. On August 12, 1999, the Sixth Circuit affirmed the District Court's decision, holding that the illegal

payments themselves, and the expansion of the bribery scheme to new programs, were not "overt acts" restarting the limitations clock.

ARGUMENT

The case is significant because the Sixth Circuit's interpretation of this Court's decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), and the "continuing violation" standard it announces, would permit unlawful payments such as those in this case to be made in perpetuity, provided suit was not brought within four years of the scheme's original formulation. This is a substantial departure from the interpretation of Zenith announced by several other circuits, significantly the Ninth Circuit.

While acknowledging the "continuing violation" standard articulated by this Court, the Sixth Circuit denies it viability by redefining "new and independent act" to mean "new scheme," concluding that all acts undertaken in furtherance of

a decision to violate the anti-trust laws are by definition a mere manifestation of that initial decision and part of the same indivisible scheme. This is apparent from the lower court's treatment of the 1994 and 1998 model year work, which it acknowledges could be determined to be independent programs not contemplated by the initial decision to pay bribes. (Appxendix p. 7.) If award of these new programs was attended by bribes, they were by definition "new and independent" acts of bribery. To conclude, as the lower court did, that such bribes were a mere manifestation of a prior scheme, the court must rewrite the doctrine of continuing violation by substituting the concept of a "new and independent scheme" for that of a "new and independent act."

Moreover, the Sixth Circuit, in permitting the dismissal of claims on limitations grounds against a party which did not assert and thus waived the limitations defense, failed to apply the law. Its expressed

rationale that Petitioner was "on notice" to come forward with evidence that the claim was not time-barred ignores the fact that Lakian had no limitations-based defense to which Petitioner needed to respond.

A. Under the Sixth Circuit Rule, Parties Who Violate Robinson-Patman for Four Years Could Continue Violating It Forever, Even While Expanding the Scheme to New Transactions

In Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, this Court held:

> In the context of a continuing conspiracy to violate the antitrust laws ... each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Zenith, 401 U.S. at 338.

The Sixth Circuit previously recognized that:

> An overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff.

DSX, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir. 1996).

The Sixth Circuit's interpretation of Zenith and DSX in this case deems the initial formulation of the kickback scheme in 1989 the only cognizable "overt act" under the "continuing violation" doctrine. The award of discrete and independent new model year programs for 1994 and 1998 made concurrent with the payment of bribes is dismissed as a mere manifestation of the scheme's original objectives. [Appendix, p. 7.] In so concluding, the Sixth Circuit acknowledged that Petitioner may be able to establish a nexus between the

1994 and 1998 model year awards and the concurrently paid bribes. (Appendix, p. 7.)

Thus, under the Sixth Circuit's interpretation of Zenith, the initial 1989 scheme could be expanded to additional model year programs including those of 1994 and 1998 and continuing into the next millennium, without ever restarting the limitations clock.

The Sixth Circuit reaches this result by replacing the concept of an independent "act" with a new formulation -- new and independent "scheme:"

> Grand Rapids' failure to obtain the 1994 or 1998 work, if in fact a result of the commission payment scheme, merely constitutes an effect of the overt act, **i.e., the payment scheme**, and therefore does not restart the statute of limitations.

GRP v. Lakian, p. 7, Appx. (emphasis supplied). By casting the individual acts made illegal by §13(c) (payment of bribes) as a single act (a "payment

scheme"), the Sixth Circuit rewrites the continuing acts doctrine into one where only a brand new scheme, rather than continuing unlawful acts, would restart the statute. Such an interpretation is at odds with that of every other court that has considered the issue.

Indeed, this Court addressed this very circumstance in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502, n. 15 (1968):

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span [citation omitted]. Rather, we are dealing with conduct which constitutes a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . .

In Twin City Sport Service, Inc. v. Charles O. Finley Co., 512 F.2d 1264 (9th Cir. 1975), *cert. denied* 459 U.S. 1009 (1982). The Ninth Circuit applied Hanover Shoe to a fact scenario similar to that in the present case. A monopolistic

concession contract had a 15 year term. Although the contract was not challenged until more than 4 years after it was entered, the Ninth Circuit held the statute had not run:

> A civil cause under the Sherman Act arises **each time** the plaintiff's interest is invaded to his damage, and the statute begins to run at that time. Suchow Borax Mines Consol., Inc., v. Borax Consol., Ltd., 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 US 943 (1951).

Twin City at 512 F.2d 1270 (emphasis supplied). Going on to cite Hanover Shoe, the Court held the statute was refreshed by continuing performance of the illegal scheme:

> **To hold otherwise is to say that some damage that might have been sustained was barred before it accrued.**

Twin City at 512 F.2d 1270 (emphasis supplied).

The Sixth Circuit, however, blesses in this case the very result

the Ninth Circuit forbade: it rules that claims based upon the noncompetitive award of the 1992, 1994 and 1998 model year programs are all barred because the kickback scheme itself was entered in 1989.

Even more analogous to the case at bar is Hennegan v. Pacifico Creative Service, Inc., 787 F.2d 1299 (9th Cir. 1986); *cert. denied*, 479 U.S. 886 (1986), where plaintiff alleged a monopolistic agreement between souvenir vendors and tour guides, pursuant to which guides were paid kickbacks to direct tourists to co-conspirators' shops. Although the scheme was established more than four years earlier, the Ninth Circuit held the illegal kickbacks paid after the statute expired restarted the

limitations clock; characterizing the payments themselves as "overt acts." Hennegan at 787 F.2d 1301.

"New and independent acts" may even include active enforcement of policies put into place outside the limitations period. In Columbia Steel Casting Co. v. Portland General Electric Co., 111 F.2d 1427 (9th Cir. 1996); *cert. denied*, 523 U.S. 1112 (1998), a power company refused to sell power to the plaintiff under an 18-year-old horizontal market share division agreement. The Ninth Circuit held that because the original agreement "was not a permanent and final decision," the subsequent refusal was a new and independent act.

This Court as well focused upon the significance of individual sales

and payments in its recent limitations decision, Klehr v. A.O. Smith, 521 U.S. 179; 117 S. Ct. 1984; 138 L. Ed. 2d 373 (1997):

> Antitrust law provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of year, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Klehr, 521 U.S. 179; 117 S. Ct. 1984 at 1190.

The Sixth Circuit failed to recognize that both the continuing payment of bribes, as well as the award of new programs pursuant to the original illegal scheme, "must be viewed as continuing series of acts upon which successive causes of action may accrue." Poster Exchange, Inc. v. National Screen Service Corp., 517

F.2d 117, 125 (5th Cir. 1975). [Defendant's refusal to deal with plaintiff not properly characterized as "a single act and invasion"]. See also Hugh Chalmers Motors, Inc. v Toyota Motor Sales, USA, Inc., 184 F.3d 761, 763 (8th Cir. 1999) ["a plaintiff may bring suit on the basis of, and recover damages for independent predicate acts occurring within four years of suit, regardless of when the initial injury occurred."]

This Court's pronouncement in Zenith informed by the application of the "continuing violation" doctrine by the Ninth and other Circuits exposes the error of the Sixth Circuit in submerging the concept of "independent act" into an analysis of the broader scheme of which those acts are a part. In doing so, the Sixth Circuit rewrites the "continuing violation" doctrine as pronounced by this Court,

places it at odds with the Ninth, Fifth and Eighth Circuits and invites the absurd result of barring relief for damage sustained before that damage accrued.

B. The Sixth Circuit Improperly Allowed Lakian To Enjoy Relief Under A Defense He Had Waived

Statutes of limitations are an affirmative defense specifically enumerated in Fed.R.Civ.P. 8(c), which must be expressly raised or else is waived. Senter v. General Motors Corp., 532 F.2d 511, 530 (6th Cir. 1976). Defendant Lakian did not raise the statute of limitations defense in his pleadings, nor did he request relief by motion. He did not join the motions of his co-defendants or seek to amend his pleading to rely upon a limitations defense in this trial ready case.

The District Court dismissed the claims against Lakian without discussion of the fact that Lakian was

not a movant. The Sixth Circuit affirmed, reasoning that Petitioner was "on notice" to come forward with evidence that its claim against Lakian was not time-barred, lest the Court dismiss the claim *sua sponte*.

This analysis avoids Petitioner's argument that Lakian had not asserted and had thus waived the limitations defense. Petitioner had no obligation to rebut such a defense because none existed.

CONCLUSION

The Robinson-Patman Act has been recognized by this Court as important legislation protecting business and ultimately consumers from the pernicious effects of awarding contracts based not upon price but upon the payment of bribes.

The Sixth Circuit in this case has effectively created a "grandfather clause" for Robinson-Patman violators, by which those who have violated the Act for four years may continue their scheme in perpetuity without fear of civil suit. Such a rule may well

embolden potential monopolists: if they can avoid scrutiny for four years, they may continue their scheme forever.

Respectfully Submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GRAND RAPIDS PLASTICS, INC.,
Plaintiff-Appellant,

v.

CRAIG M. LAKIAN, et al.,
Defendants-Appellees.

No. 98-1698

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 96-73615—Lawrence P. Zatkoff, Chief District Judge.

Argued: June 15, 1999

Decided and Filed: August 12, 1999

Before: MARTIN, Chief Judge; JONES and SUHRHEINRICH, Circuit Judges.

COUNSEL

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VESTEVICH, MALLENDER, DUBOIS & DRITSAS, Bloomfield Hills, Michigan, for Appellees. **ON BRIEF:** John E. Anding, Christopher G. Hastings, DREW, COOPER & ANDING, Grand Rapids, Michigan, for Appellant. William J. Lamping, VESTEVICH, MALLENDER, DUBOIS & DRITSAS, Bloomfield Hills, Michigan, William H. Baughman, Jr., WESTON, HURD, FALLON, PAISLEY & HOWLEY, Cleveland, Ohio, Thomas P. Casey, Harper Woods, Michigan, J. Walker Henry, Detroit, Michigan, for Appellees.

OPINION

BOYCE F. MARTIN, JR., Chief Judge. Grand Rapids Plastics, Inc. appeals the district court's findings that its Robinson-Patman Act claims were barred by the statute of limitations and that Grand Rapids had no tortious interference claim because it had no business relationship or expectancy with Daikyo-Decoma. We conclude that the district court correctly dismissed both claims.

I.

In 1988, Daikyo-Decoma, a supplier of automobile parts to automaker Mazda, needed to find a molder of custom-designed interior parts. Reiso Hiromitsu was the head of Daikyo-Decoma at this time and until 1990. Craig Lakian, an account representative for Decorative Systems Marketing, Inc. was assigned to provide part-time service to Daikyo-Decoma at this time. Daikyo-Decoma asked him to offer "opinions and recommendations" in locating an injection molding company. Lakian approached James Chapman, owner of H&L Engineering, an engineering consulting firm, whom Lakian knew to be knowledgeable about qualified molding companies.

Chapman recommended Pine River Plastics, a supplier of plastic injection molded parts for the auto industry, with whom he had an existing business relationship. Chapman contacted Tom Acton, the owner of Pine River Plastics, who expressed interest in taking over the work. Lakian assisted Acton in preparing for the meeting with Daikyo-Decoma, and both Lakian and Chapman were present at the resulting meeting between Acton and Daikyo-Decoma. Pine River bid on and was awarded the job in 1989, which we will refer to as "the 1989 work." The work began, and Pine River received payment in early 1990. In his affidavit, Hiramitsu stated that Lakian never participated in any of Daikyo-Decoma's hiring or contractual decisions.

Also in 1990, Daikyo-Decoma asked Pine River to bid on interior plastic trim parts for the 1992 model year Mazda vehicles, which we will call "the 1992 work." Pine River bid on and was awarded the interior plastic trim parts work, but realized it did not have the capacity to complete all the work and declined to produce the console parts. Pine River began production in 1992, and is still producing the interior plastic trim. Lakian introduced Grand Rapids Plastics to Daikyo-Decoma in July 1990. Grand Rapids bid on the console work that Pine River had declined and was awarded the job in October 1990. Prior to July 1990, Grand Rapids Plastics had no existing relationship with Daikyo-Decoma.

In July 1990, Pine River began paying Chapman a six percent commission for any of Pine River's parts that he sold. Chapman and Lakian had agreed that if Pine River got the 1989 work, Chapman would pay thirty-five percent of his commission to Lakian. Pine River terminated its agreement with Chapman in 1994, but continued to pay him until 1995. Although it is unclear from the record exactly how the commissions were distributed, Chapman ultimately paid Lakian approximately $300,000. It seems that Pine River was unaware that any money was wrongfully paid to Lakian.

Lakian resigned from Decorative Systems Marketing effective August 31, 1990, but Grand Rapids contends that he continued to influence Daikyo-Decoma. In February 1992, Fred Blackstone, Executive Vice President of Grand Rapids, met with Lakian to discuss the possibility of a job. Blackstone stated in his deposition that at the meeting, Lakian demanded payment of commissions on the work he had brought Grand Rapids. Blackstone testified that Lakian told him that he needed a commission to pass on to Daikyo-Decoma's engineering manager, Steve Shinoda. Blackstone refused to pay unless Lakian signed a written agreement to be a Grand Rapids manufacturer's representative. According to Blackstone, Lakian threatened that if Grand Rapids did not pay the commissions, they would not get any more work from Daikyo-Decoma. Despite the threat, Grand Rapids did almost four million dollars worth of business with Daikyo-Decoma in 1992 under a new contract for production of a rear finisher for which Pine River was not asked to bid. In addition, Lakian asked Pine River's engineer for a price reduction on behalf of Daikyo-Decoma sometime in 1992. Richard Ross, the engineer, testified that Lakian "held himself out as a Daikyo-Decoma person."

In 1992, Pine River and Grand Rapids bid head-to-head on work in connection with Mazda's 1994 European Model Year for Daikyo-Decoma, "the 1994 work," and Daikyo-Decoma awarded the contract to Pine River. In 1994, Daikyo-Decoma asked Grand Rapids to bid on a 1998 model year program, called "the 1998 work." Daikyo-Decoma did not ultimately consider the bid and awarded the contract to Pine River. Ultimately, Pine River was Daikyo-Decoma's sole supplier for the transfer work, dashboard parts, and meter hoods. Grand Rapids was the sole source for rear finishers and the 1992 consoles.

Lakian sued Grand Rapids in 1995 for the commissions he claimed were due him, but the case was dismissed. Grand Rapids Plastics filed its complaint against Chapman, H&L, Pine River, and Lakian on June 26, 1996, claiming a violation

of the Robinson-Patman Act and tortious interference with business relations under Michigan state law. Chapman, H&L, and Pine River asserted that the statute of limitations had expired on Grand Rapids's claims, and alternately argued that the claims were legally incorrect and factually untrue. Chapman, H&L, and Pine River filed motions for summary judgment in June 1997. The district court granted summary judgment and dismissed Grand Rapids's claims against all defendants, finding that the claims were time barred. The district court dismissed the claims against Lakian, although he had neither raised the statute of limitations defense nor filed a motion for summary judgment. The district court denied Grand Rapids's motion for reconsideration on May 13, 1998.

II.

Grand Rapids first challenges the district court's finding that its Robinson-Patman Act claims were barred by the statute of limitations. We review a district court's grant of summary judgment *de novo*. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1176 (6th Cir. 1996). A grant of summary judgment is appropriate if no genuine issue of material fact exists and one party is entitled to judgment as a matter of law. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989). A "genuine issue of material fact" is one which, if proven at trial, would result in a reasonable jury finding for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A plaintiff has four years after a cause of action accrues to enforce a violation of 15 U.S.C. § 13(c) of the Robinson-Patman Act. *See* 15 U.S.C. § 15b. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Chapman agreed to pay Lakian thirty-five percent of

his commission sometime between 1989, when Chapman recommended Pine River to Daikyo-Decoma, and July 1990, when Chapman received his first commission and subsequently paid Lakian. Daikyo-Decoma awarded the 1989 work and the 1992 work in 1989 and 1990, respectively. Therefore, unless tolled, Grand Rapids did not bring its Robinson-Patman claim within the four-year statute of limitations.

The Supreme Court has, however, recognized a "continuing violation" exception to the general four-year statute of limitations.

> A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. When a continuing antitrust violation is alleged, a cause of action accrues each time the plaintiff is injured by an act of the defendants. Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act . . . . An overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff.

DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir. 1996) (internal quotations omitted).

Grand Rapids argues that each payment to Lakian, which continued through 1995, was an independent wrongful act that started the statute of limitations running. However, even if the payment agreement constituted a continuing violation of the Robinson-Patman Act, the individual payments to Lakian were only a manifestation of the previous agreement. The individual payments therefore do not constitute a "new and independent act," as required to restart the statute of limitations. *See id.* at 467-68.

Although Grand Rapids does not allege that Chapman and Lakian entered any agreement regarding the 1994 work or the 1998 work, it argues that a jury could infer that the money paid to Lakian for the 1989 and 1992 work also insured that Pine River would receive the 1994 and 1998 work. Nevertheless, even if Grand Rapids offered evidence at trial that allowed the jury to make this inference, Grand Rapids's subsequent failure to obtain the 1994 and 1998 work, awarded in 1992 and 1994, respectively, does not start the statute of limitations running. "For statute of limitations purposes, the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts." *Id.* at 467. Grand Rapids's failure to obtain the 1994 or 1998 work, if in fact a result of the commission payment scheme, merely constitutes an effect of the overt act, i.e., the payment scheme, and therefore does not restart the statute of limitations.

Grand Rapids next argues that its claim falls under the speculative damages exception to the four-year statute of limitations, arguing that, because of the nature of the automotive industry, it suffered damages incapable of being proven within four years of the commission of the overt act. With regard to damages that have not yet been suffered or are too speculative to be ascertained at the time a plaintiff's business is injured, the limitations period does not begin to run until the damages are ascertainable. *Zenith*, 401 U.S. at 338. Grand Rapids, the party seeking to avoid the statute of limitations, bears the burden of proof. *Akron Presfrom Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974).

Grand Rapids points out that when a contract for automotive parts is awarded, it establishes a price for the parts, but does not obligate the company to order any parts. When a job enters production, parts are ordered by "releases" issued against the original contract. Grand Rapids asserts that because the 1989, 1992, 1994, and 1998 work did not enter production right away, and some projects have continued to the present, the damages suffered as a result of the payment

scheme were too speculative to prove within the four-year statute of limitations.

However, this Court has held that a plaintiff's own projections and experience during its years of operation are sufficient to provide a reasonable basis for calculating damages. *See Kabealo v. Huntington Nat'l Bank*, 17 F.3d 822, 827 (6th Cir. 1994). "If they felt that they could not present sufficiently exact evidence of damages within that time, they could have filed suit and requested a stay . . . . They acted at their risk in waiting until the statute of limitations had run and the district court correctly determined that their action was barred." *Id.* at 827-28.

Similarly, Grand Rapids acted at its own risk by failing to file its Robinson-Patman claim within the statute of limitations. Grand Rapids is a first-tier supplier to automakers and a second-tier supplier to companies that resell to automakers. Using its experience in the industry, Grand Rapids could have provided a reasonable basis for calculating damages. Even if the potential damages were not initially calculable, the 1989 work went into production in 1990 and was completed by 1992. Grand Rapids could have used the releases issued for that project to allow the jury to reasonably calculate damages. The district court correctly concluded that Grand Rapids did not carry its burden of proving that its losses were so speculative as to fall within the speculative damages exception. Therefore, Grand Rapids's Robinson-Patman Act claims were barred by the statute of limitations.

Next, Grand Rapids asserts that the district court erred by granting *sua sponte* summary judgment for Lakian although he neither raised the statute of limitations as a defense nor moved for summary judgment. The Supreme Court has held that a district court may enter summary judgment *sua sponte*, "so long as the losing party was on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

In the present case, the other parties' motions for summary judgment put Grand Rapids on notice that, to survive summary judgment, it had to come forward with evidence showing that the statute of limitations did not bar its Robinson-Patman claims. Therefore, although Lakian did not move for summary judgment, and in fact did not raise the statute of limitations defense in his answer, the district court did not err in granting *sua sponte* summary judgment in favor of Lakian.

III.

Finally, Grand Rapids asserts that the district court erred by dismissing its tortious interference claim, arguing that it presented sufficient evidence to create a genuine issue of material fact regarding a valid business relationship or expectancy.[1]

To establish a claim for tortious interference under Michigan law, a plaintiff must show: (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the defendant, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage. *Michigan Podiatric Med. Ass'n v. National*

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[1]The district court had supplemental jurisdiction over Grand Rapids's state law tortious interference claim pursuant to 28 U.S.C. § 1367, which explicitly allows district courts to dismiss pendent state law claims if all federal claims have been dismissed. *See* 28 U.S.C. § 1367(c)(3). Therefore, upon dismissing Grand Rapids's Robinson-Patman claim, it was within the district court's authority and discretion to dismiss the state law tortious interference claim. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254 (6th Cir. 1996). Although generally, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well," *Hankins v. The Gap, Inc.*, 84 F.3d 797, 803 (6th Cir. 1996) (internal quotations omitted), the district court in the present case elected to address Grand Rapids's state law tortious interference claim "in the interest of judicial economy." Accordingly, we find that the district court did not abuse its discretion in addressing the claim.

Foot Care Program, Inc., 438 N.W.2d 349, 354 (Mich. Ct. App. 1989). The district court dismissed the tortious interference claim on the first factor, holding that Grand Rapids had not presented a genuine issue of fact as to whether it had an existing business relationship or expectancy of one with which the payment scheme interfered.

When Lakian and Chapman agreed to split commissions in 1989, Grand Rapids and Daikyo-Decoma had no existing business relationship. In fact, neither party knew of the other until July 1990, when Lakian introduced Grand Rapids Plastics to Daikyo-Decoma. Grand Rapids bid on the console work that Pine River had declined and was awarded the job in October 1990. Therefore, before 1990, Grand Rapids can allege at most an expectancy of a business relationship.

"The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v. Pontiac Osteopathic Hosp.*, 354 N.W.2d 341, 348 (Mich. Ct. App. 1984). Grand Rapids argues that because it was eligible to do work with Daikyo-Decoma, allegations of bid-rigging are enough to state a tortious interference claim. It relies on *Advanced Power Sys. v. Hi-Tech Sys.*, 801 F. Supp. 1450 (E.D. Pa. 1992), where the plaintiff "was one of a limited number of approved subcontractors eligible to bid for IBM's business. The court therefore held that the averment of a rigged bidding process sufficiently establishes a "reasonable likelihood or probability" that an anticipated business arrangement would have been consummated but for APS's interference." *Id.* at 1459-60.

However, Grand Rapids has offered no evidence to show that it was one of a limited number of companies eligible to bid for Daikyo-Decoma's business. Instead, Grand Rapids states that it was one of only two companies to whom Daikyo-Decoma **awarded** or asked to bid on this type of work since 1989. Because Daikyo-Decoma had no knowledge of Grand Rapids until Lakian introduced them in

July 1990, Grand Rapids cannot show an expectancy of a business relationship for either the 1989 or 1992 work.

Similarly, Grand Rapids had no legitimate expectancy of being awarded either the 1994 or 1998 work. The fact that Daikyo-Decoma hired Grand Rapids to do some work in 1990 did not indicate that it would hire Grand Rapids for the 1994 or 1998 work. Nowhere is the standard for proving tortious interference better stated than in *Lewis v. Bloede*, 202 F. 7 (4th Cir. 1912). There, the court said, "if the ground of complaint is that [the plaintiff] was about to make a contract, he is required to go further and show that he was not only 'about to,' but would, but for the malicious interference of defendants, have entered into the contract." *Id.* at 17. Grand Rapids has failed to offer evidence to show that, but for Chapman's agreement with Lakian, Daikyo-Decoma would have entered into a contract with Grand Rapids for either the 1994 or the 1998 work. The district court correctly dismissed Grand Rapids's tortious interference claim because Grand Rapids failed to present sufficient evidence to create a genuine issue of material fact regarding a valid business relationship or expectancy. AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GRAND RAPIDS PLASTICS, INC.,
a Michigan Corporation,

Plaintiff,

vs.

CASE NO. 96-CV-7361-DT
HON. LAWRENCE P. ZATKOFF

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC., a Michigan
Corporation, PINE RIVER PLASTICS INC.,
a Michigan Corporation, jointly and severally,

Defendants.

_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the
United States Courthouse, in the City of
Detroit, State of Michigan, on the
14th day of November, 1997 .

PRESENT: HON. LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on several motions brought by the Defendants. Plaintiff has responded and Defendants have replied. The Court has accepted and considered each of the supplemental pleadings submitted by the parties. The Court will identify and address each of the motions in this single Order. The Court finds that the facts and legal arguments are adequately presented in the parties' briefs and the decisional process would not be significantly aided by oral arguement. Therefore, pursuant to E.D. Mich. Local R. 7.1(e)(2), it is hereby ORDERED that the motions be resolved on the briefs submitted. For the reasons set forth below Defendants' motions for summary judgment are granted.

II. BACKGROUND

A. The Players

1. Grand Rapids Plastics

Plaintiff Grand Rapids Plastics, Inc., is in the plastic injection molding business in Grand Rapids, Michigan. Grand Rapids Plastics produces custom injection molded plastic parts for the automotive industry. It is both a first tier supplier to automakers and a second tier supplier to companies that resell to automakers.

2. Pine River Plastics

Defendant Pine River Plastics, Inc., is in the plastic injection molding business in Port Huron, Michigan. Pine River Plastics produces plastic injection molded parts for the automotive industry. It is a second tier supplier.

3. Chapman/H&L Engineering

Defendant H&L Engineering is an engineering consulting firm owned by Defendant James Chapman. Mr. Chapman has experience in the design and use of plastic injection molding equipment. Chapman consulted with Pine River Plastics. H&L Engineering acted as a manufacturers representative on behalf of Pine River Plastics in arranging the sale of parts from Pine River Plastics to Daikyo-Decoma. Both Chapman and H&L Engineering are Michigan residents.

4. Craig Lakian

Defendant Craig Lakian was employed from 1988 to August 31, 1990 by Decorative Systems Marketing, Inc. After August 31, 1990, until the present, Mr. Lakian has been employed as an

account representative at Masland Industries, selling carpet. While employed by Decorative Systems Marketing, Mr. Lakian was assigned to assist Decoma Plastics in identifying suppliers, and from 1989, to both Decoma Plastics and Daikyo-Decoma Corporation.

5. Daikyo-Decoma

While in operation from 1989 to 1994, Daikyo-Decoma was a first tier supplier to Mazda/Auto Alliance Incorporated. It was engaged in buying custom made parts and supplies from suppliers and reselling them to Mazda/Auto Alliance. Daikyo-Decoma was originally a joint venture set up by Daikyo Corporation of Japan and Decoma Plastics of Canada. The offices were located in Southfield, Michigan. Daikyo-Decoma

was dissolved in 1994 and its operations were taken over by DDM Plastics. Neither Daikyo-Decoma nor DDM Plastics are parties to this action.

6. Auto Alliance Incorporated

The U.S. manufacturing arm of Mazda, onto whose cars the parts at issue in this case were ultimately incorporated. Neither Mazda nor Auto Alliance is a party to this action.

B. Their Actions

In 1988 Daikyo-Decoma became unhappy with the quality of the parts it was then buying and decided to find another plastic injection molder to supply its parts. At this time, Craig Lakian was employed by Decorative Systems Marketing, Inc. Decorative Systems Marketing was under contract to provide account representatives to sell the

products of Decoma Plastics and Daikyo Decoma to buyers in the automotive industry. Lakian was assigned by Decorative Systems Marketing to provide these services part-time to Decoma Plastics and part-time to Daikyo-Decoma. Accordingly, Daikyo-Decoma sought Lakian's assistance in locating an injection molding company to replace their current supplier.

Lakian approached Jim Chapman of H&L Engineering regarding qualified injection molding companies. Lakian apparently knew of Jim Chapman through prior business contacts. Lakian and Chapman had not conducted business previously, however, Lakian knew Chapman was experienced in the injection molding business and was likely to be knowledgeable about qualified

molding companies. After Lakian contacted Chapman regarding the "transfer"[1] work, Chapman recommended Pine River Plastics, with whom he had an existing business relationship.

Thereafter, Chapman contacted Tom Acton, the owner of Pine River Plastics, to see if Pine River would be interested in obtaining the transfer work. Acton expressed interest and a meeting was arranged between representatives of Daikyo-Decoma and Tom Acton of Pine River. Lakian and Chapman were also present at that meeting. Also, Lakian had given information to Tom Acton in preparation for the meeting regarding Japanese

[1] The work at issue in 1989 was known as the "transfer work" because the tooling was already in existence and the tools were merely transferred from the supplier Daikyo-Decoma was dissatisfied with to Pine River Plastics.

business culture and what qualities Daikyo-Decoma was looking for in its suppliers.

Following the meeting, and other contacts between the Pine River and Daikyo-Decoma, Pine River bid on the transfer work and was awarded the business in 1989. The tools were transferred and production on the transfer work began, and payment received, in early 1990. Also in 1990, Daikyo-Decoma asked Pine River to bid on interior plastic trim parts for the 1992 model year Mazda vehicles (the "1992 work"). Pine River bid on the entire 1992 work and was notified in June of 1990 that they were to be awarded the work.

However, after bidding on the 1992 work, Pine River realized it did not have the capacity to produce all of the parts. Therefore, Pine River

agreed to only produce the dashboard parts, rejecting the console parts. In August, 1990, Daikyo-Decoma issued Pine River a purchase order for the 1992 dashboard work. Pine River began actual production of the 1992 parts in 1992, and is producing them through the present.

Because Pine River turned down the console portion of the 1992 work, Daikyo-Decoma needed to find another company to make those parts. Thus, Lakian found Grand Rapids Plastics and introduced them to Daikyo-Decoma in July, 1990. Before Lakian's introduction, there had been no business relationship between Daikyo-Decoma and Grand Rapids Plastics. Grand Rapids prepared and submitted bids for the console work which was accepted by Daikyo-Decoma in October, 1990.

Accordingly, Pine River Plastics was the sole supplier of the transfer work as well as the 1992 dashboard work, and Grand Rapids Plastics was the sole supplier of the 1992 console work.

After Chapman brought the Daikyo-Decoma work to Pine River in 1989, he and Acton verbally agreed that Chapman would be paid a 6% commission by Pine River based on the dollar volume of the Daikyo-Decoma work. In July of 1990 Pine River began paying the monthly commissions to Chapman through H&L Engineering. Chapman in turn paid 35% of the commission he was receiving from Pine River to Craig Lakian. Chapman and Lakian had previously agreed that if Daikyo-Decoma awarded the transfer work and/or the 1992 work to Pine River, Chapman

would pay a percentage to Lakian. The commissions paid by Pine River to Chapman continued for five years -- the 1992 work continues through the present -- gradually decreasing as Chapman's involvement with the program diminished over the years. Pine River ultimately stopped paying commissions to Chapman in 1995. Likewise, Lakian continued to receive a percentage of Chapman's commission payments on the continuing 1992 work through 1995 as well.

Lakian contends that he did not ask Chapman for a percentage of his commission, but, rather, Chapman offered it and he accepted. Chapman on the other hand, contends that Lakian first raised the issue of a percentage of his commission from Pine River for bringing him the

business. In any event, Chapman ultimately paid Lakian some $300,000 through 1995. Furthermore, Tom Acton, owner of Pine River Plastics, contends that he was not aware that Chapman was sharing commissions he received from Pine River with Lakian, although that is contested by the Plaintiff.

In August, 1990, Lakian resigned from his employment at Decorative Systems Marketing, and hence as a representative of Daikyo-Decoma, effective August 31, 1990. Thereafter he went to work for Masland Industries, where he remains today as a sales representative selling carpet.

Sometime in 1992, Pine River Plastics and Grand Rapids Plastics bid head-to-head on parts Daikyo-Decoma had contracted to provide Mazda in connection with Mazda's 1994 European Model

Year. That work was awarded to Pine River. In late 1994, Pine River and Grand Rapids Plastics bid on the 1998 model year work. That work was also awarded to Pine River.

Plaintiff filed this suit on June 26, 1996, alleging that the payments by Chapman to Lakian were an illegal kickback under the Robinson Patman Act (the "Act"). Plaintiff's complaint alleges that Chapman and H&L Engineering violated the Act by paying the kickbacks to Lakian. Plaintiff also claims that Pine River violated the Act when its representative, Defendant H&L Engineering, through Defendant Chapman, paid the kickbacks to Lakian, allegedly giving it an unfair advantage in competing for work. Defendant Lakian is alleged to have violated the Act by receiving the kickbacks

without providing bona fide services. Plaintiff claims that a direct result of the Defendants actions it has suffered an anti-competitive injury including lost revenues and profits. In addition, Plaintiff's complaint alleges that the Defendants actions tortiously interfered with a business relationship and/or business expectancy.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party."

Anderson v Liberty Lobby. Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the non moving party." Id. 106 S.Ct. at 2510. Where "the moving party has carried its burden under 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986) (footnote omitted); Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986).

IV. OPINION

A. Statue of Limitations

Defendants Chapman/H&L Engineering (hereinafter collectively referred to as "Chapman") move for summary judgment based on the statute of limitations. Chapman argues that Plaintiff's claims of tortious interference and violation of the Robinson-Patman Act are beyond the applicable statute of limitations.

Because the Court finds no genuine issue of material exists regarding Plaintiff's substantive tortious interference claim against the Defendants, infra, it is only necessary to address Chapman's limitation argument as it relates to the Robinson-Patman claim.

Any action to enforce a violation of 15 U.S.C. § 13(c) of the Robinson Patman Act must be commenced within four years after the cause of action accrued. See 15 U.S.C. § 15b. A cause of action accrues and the statute begins to run each time a defendant commits an act that injures a plaintiff's business. Zenith Radio Corp. v Hazeltine Research. Inc., 401 U.S. 321, 338 (1971). "For statute of limitations purposes, the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts." Dxs. Inc. v. Siemens Medical Systems. Inc., 100 F.3d 462, 467 (6th Cir.1996) (internal citations omitted).

Applying this authority to the case at bar, it is clear Plaintiff's Robinson-Patman claim is beyond

the applicable statute of limitations. Plaintiff's claim is based upon the allegedly illegal agreement between Chapman and Lakian to split the commissions Chapman received from Pine River for work Daikyo-Decoma placed with Pine River (Complaint ¶31). It is Plaintiffs contention Pine River obtained an unfair and illegal advantage when it paid (legal) commissions to Chapman that it knew (allegedly) were being split with Lakian, and that Lakian was influencing Daikyo-Decoma to direct work to Pine River because of the kickbacks he (Lakian) was receiving (Complaint ¶31).

Thus, the wrong Plaintiff suffered is the loss of Daikyo-Decoma work placed with Pine River due to the alleged kickback agreement between Lakian and Chapman (and allegedly Pine River)

(Complaint ¶¶ 36-50). This loss occurred in 1989 and 1990 respectfully, when the transfer work and the 1992 model year work was awarded to Pine River while the agreement between Chapman and Lakian was in place. Thus, the overt acts which allegedly caused injury to Plaintiff's business took place in 1989 and 1990. Accordingly, the statute of limitations accrued at the latest, in August of 1990, when Daikyo-Decoma issued Pine River Plastics a purchase order for the 1992 work. Accordingly, this suit is beyond the applicable four year statute of limitations.

In an attempt to extend the limitations period, Plaintiff argues that "each payment to Lakian was an independent wrongful act, and those payments continued through the filing of this suit."

Although the statute of limitations is not tolled simply due to a plaintiff's failure to discover a cause of action, the limitations period does begin to run anew for a continuing antitrust violation. As the Supreme Court stated:

> [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Zenith Radio Corp. v. Hazeltine Research. Inc., 401 U.S. 321, 338 (1971).

The Sixth Circuit elaborated:

> A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded. When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants.

> Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statue runs from the last over act.
>
> * * * *
>
> An overt act that restarts the statute of limitations is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff ... acts that are merely unabated inertial consequences (of a single act), do not restart the statute of limitations.

Dxs. Inc. v. Siemens Medical Systems. Inc.,100 F.3d 462,467-468 (6th Cir.1996) (internal citations and quotations omitted).

Contrary to Plaintiff's contention, each payment to Lakian was not an independent wrongful act. The fact that Lakian received

payments up to the date of the filing of this lawsuit is insufficient as a matter of law to establish a continuing antitrust violation. The Court agrees with the Defendant that the continued payments to Lakian do not cause further and separate injury regardless of when they are received. Plaintiff's injury is the loss of work and that allegedly took place in 1989 and 1990 when Daikyo-Decoma awarded the work to Pine River Plastics and the agreement between Lakian and Chapman was in effect. Therefore, the payments were not 'new and independent acts' that inflicted a new injury, but rather, merely a reaffirmation, or unabated inertial consequence, of the previous agreement between Lakian and Chapman. Id; See also Kaiser Aluminum v. Avondale Shipyards. Inc., 677 F.2d

1045,1052-1055 (5th Cir.1982) cert. denied 103 S.Ct. 729,459 U.S. 1105 (subcontractor's continued receipt of payments under subcontract did not constitute continuing violation so as to allow antitrust claim to be brought more than four years after events that created cause of action).

In addition, the failure of Grand Rapids Plastics to obtain the 1994 and 1998 work (awarded in 1992 and 1994 respectfully) is also not an independent wrongful act or a continuing violation. There is an absence of evidence to indicate that the award of that work was a violation at all.

In order for Plaintiff to be within the statute of limitations, the failure to obtain the 1994 or 1998 work -- in 1992 and 1994 -- would have to be shown to be due to an overt act committed by the

Defendant(s) that injured the Plaintiff's business. Zenith Radio Corp. v. Hazeltine Research. Inc. 401 U.S. 321,338 (1971); Dxs. Inc. v. Siemens Medical Systems. Inc., 100 F.3d 462, 467 (6th Cir. 1996). However, there is no evidence of improper influence -- from Lakian, Chapman, Pine River or Daikyo-Decoma in regard to the award of 1994 or 1998 work. Thus there is no evidence that Plaintiff's failure to receive the 1994 and 1998 work -- which it was offered to, and in fact did, bid on -- was due to an overt act committed by the Defendant(s), causing injury to Plaintiff's business.

Plaintiff's complaint fails to allege any wrongful acts performed by the Defendants during the four years preceding the filing of this lawsuit. However, in its brief on summary judgment

Plaintiff appears to imply such an act when it argues that the payments made to Lakian in connection with the transfer work and the 1992 work, "assured that Pine River would, in accordance with Japanese custom, get the 1994 and 1998 model year work even in the absence of further bribes." (Plaintiff's Response, p. 28). Thus, it appears to be Plaintiff's argument that the money paid in connection with the 1989 transfer work and the 1992 work, affected the bidding and award of the 1994 and 1998 work, and, but for those payments, it would have been the supplier chosen for all of the 1994 and 1998 work. If such was the case, a violation could be found in 1992 or 1994 when the 1994 and 1998 work was awarded, and, Plaintiffs cause of action would be within the statute of limitations. However, there is

no evidence from which a reasonable juror could find that Grand Rapids failure to obtain the 1994 or 1998 work was due to an antitrust violation.[2]

First, it is not alleged, nor is any evidence presented that Lakian received, or was scheduled to receive, any monies from Chapman, through Pine River, involving the award of the 1994 and 1998 model year work; work which the Plaintiff bid on but was not awarded. According to the evidence, the agreement between Chapman and Lakian only involved Chapman's commissions on the Daikyo-Decoma transfer work and the 1992 model year work placed with Pine River in 1989 and 1990 respectfully (Chapman deposition, Exh. E, p.156-

[2] The Court's analysis, and the relevant inquiry, is whether the evidence presented by the Plaintiff indicate influence over the 1994 and 1998 work - - awarded in 1992 and 1994 respectfully.

157). Although payments continued to Chapman, and hence to Lakian through 1995, this was due to the continuation of the 1992 model year work; work which continues to the present. Thus, since there was no agreement between Chapman and Lakian regarding the 1994 or 1998 work, there was no reason for Lakian to influence the placement of that work; even assuming he had the ability to do so in 1992 or 1994, after having left the employ of Decorative Systems Marketing/Daikyo-Decoma in August of 1990.

Second, in addition to there being no reason why Lakian would influence the placement of the 1994 or 1998 Daikyo-Decoma work, there is no credible evidence that he had the ability to do so. Lakian resigned from Decorative Systems

Marketing, and hence Daikyo-Decoma, on August 31, 1990. Plaintiff conjures up speculation, innuendo, and opinion regarding the influence Lakian may have had after he left Daikyo-Decoma in 1990, but simply lacks any facts.

Plaintiff argues that Lakian had influence over Daikyo-Decoma's decision to award work to Pine River because of Lakian's relationship with Steve Shinoda, and/or others at Daikyo-Decoma. However, this is unsupported by the evidence. Plaintiff's evidence of Lakian's influence over the placement of Daikyo-Decoma work includes: Mr. Shinoda, Daikyo-Decoma's engineering manager who evaluated quotations from suppliers before making recommendations to his boss, drove a Lincoln Continental on a salary of $50,000,

Defendant Lakian owned a rental property which he rented to Mike Tabusa who worked for Daikyo-Decoma, Defendant Lakian's bank records reveal withdrawals that he does not recall what he spent the money on, Richard Ross who thought Lakian still worked at Daikyo in 1992, Doug Clements, an employee of DDM, the successor of Daikyo-Decoma, who thought it unusual that he was not involved with the bids relating to the 1998 work, and, finally, Lakian's own self-interested statement that he had influence.

Plaintiff's allegation that Lakian had influence over Daikyo-Decoma work because he was bribing Mr. Shinoda, and/or others is purely speculative. In support of this contention, Plaintiff makes much of the fact that Mr. Shinoda, the

engineering manager at Daikyo-Decoma, drove a used Lincoln Continental on a $50,000 a year salary. The implication being that Lakian was bribing Mr. Shinoda, how else could he afford such an automobile. However, Plaintiff fails to mention that during the deposition of Kachito Harada, head of Daikyo-Decoma from 1990-1994, Mr. Harada stated that Mr. Shinoda was a millionaire (Ex. 13 p. 83). As the payments from Chapman to Lakian only totaled some $300,000, as Plaintiff admits in its complaint, Mr. Shinoda obviously did not become a millionaire from accepting bribes from Lakian (Complaint ¶39). Plaintiff's other evidence that Lakian was bribing Mr. Shinoda or someone else at Daikyo-Decoma is that Lakian cannot now explain large withdrawals he made in 1990 and 1993 from a

business he started. That is the sum total of Plaintiff's evidence that Lakian was bribing someone at Daikyo-Decoma to influence the placement of work. These 'facts' are insufficient to establish, or even create an issue of fact, that Lakian was bribing Shinoda, or anyone else at Daikyo-Decoma, or had influence over the placement of the 1994 and 1998 work.

Other evidence that Plaintiff contends supports the inference that Lakian had influence at Daikyo-Decoma after his departure in August of 1990 is that Lakian leased a rental house he owned to Mike Tabusa, a quality control clerk for Daikyo-Decoma. Plaintiff claims that Lakian leased this home for less than its market value and less than he leased it for after Tabusa moved out. However,

these claims are directly contradicted by the deposition testimony Plaintiff cites for support (Ex. 27 p.498-502). Besides, the fact that Lakian rented a house, in 1990 or 1991, to a Daikyo quality assurance employee who had no authority for sourcing work, does not evidence Lakian's influence over placement of the 1994 or 1998 Daikyo work.

Plaintiff also contends that evidence of influence exists because Grand Rapids Plastics was the better qualified company and although it bid on the 1994 and 1998 work, the inferior Pine River Plastics was awarded it instead. This is clearly an exaggeration. Mr. Harada, head of Daikyo-Decoma from 1990 to 1994 and the person responsible for choosing suppliers, testified that both companies

were "excellent in quality, delivery and cost." (Defendant's Ex. A p.23).

Plaintiff also cites the testimony of Doug Clements. Clements is an employee with DDM, the successor in interest to Daikyo-Decoma and the company which reviewed the bids and awarded the 1998 work. Clements testified that he was usually involved in reviewing bids, however. He was not involved in the 1998 bidding. When he asked why, he was told engineering was handling it. Thus, Plaintiff twists this testimony to come up with the proposition that based on these facts "Clements was suspicious that . . . someone was being paid off." (Plaintiff's response p.13). However, this mischaracterizes Clements testimony. When specifically asked whether he knew of money being

paid to someone at DDM to place the work with Pine River, Clements responded that "It is possible that was going on. I could not comment on any factual information on that." (Ex. 14 p.53). Thus, Clements had no factual information that such was the case, and was merely responding to a question speculating that such was the case.

For additional support Plaintiff puts forth the testimony of Richard Ross, an engineer at Pine River, who stated that he thought Lakian still worked at Daikyo-Decoma when he appeared at Pine River in 1992. However, Ross also admitted that he had on several occasions misidentified a man named Mike Kohler for Craig Lakian. (Ex. 25 p.32, 103-104).

The strongest evidence Plaintiff has that Lakian may have possibly had influence at Daikyo Decoma is the testimony of Charles Blackstone of Grand Rapids Plastics. According to Blackstone, in February of 1992 (a year and a half after Lakian resigned from Decorative Systems Marketing in August of 1990) he met with Lakian. Accordingly to Blackstone, Lakian told him that he wanted a commission due to his previous introduction of Grand Rapids Plastics to Daikyo Decoma back in 1990, and Grand Rapids subsequent award of that portion of the 1992 model work turned down by Pine River. In addition, Blackstone alleges that Lakian threatened him that he had influence over the placement of future Daikyo-Decoma work (Ex.

G p. 104-120).[3] First, in light of the other evidence, or the lack thereof, the veracity of this statement is doubtful given the fact that at the time it was made, Lakian was attempting to convince Blackstone to pay him commissions on the work Grand Rapids Plastics received from Daikyo-Decoma in 1990. Thus, assuming Lakian made the statement, it can be seen as nothing more than a strong arm negotiating tactic -- chest pounding -- in order to get Blackstone to pay him a commission. Second, and more importantly, Lakian's self interested statement of influence to Blackstone is directly refuted by the sworn affidavits and testimony of the Daikyo-Decoma officers responsible for placing that work.

[3] Defendant Chapman's summary judgment brief on Plaintiff's Robinson-Patman Act claim states that Lakian denies this, however, Defendant does not provide the relevant cite.

The sworn testimony of Daikyo-Decoma officers and employees indicate that Lakian had no influence over the placement of work either before, or after, he left in August 1990. Mr. Hiromitsu, Vice President and General Manager of Daikyo-Decoma from 1987 until December 1990, and the person in charge of making the final purchasing decisions, states in his affidavit that Lakian had no input or influence regarding any purchasing decisions prior to his [Lakian's] resignation in 1990. (Defendant's reply Ex. A). In addition, Mr. Hiromitsu states that after Lakian resigned in August of 1990, and up to through Mr. Hiromitsu's return to Japan in December 1990, Lakian had no influence over any of the business decisions of Daikyo-Decoma or any of its employees. (Defendant's reply Ex. A).

Moreover, Mr. Hiromitsu also states that Lakian never gave him anything of value, and Plaintiff has no evidence indicating otherwise. Id.

Likewise, Mr. Harada, who replaced Mr. Hiromitsu as head of Daikyo-Decoma in December 1990 through 1994, testified at his deposition that he was the final decision maker regarding purchasing and sourcing of work during his tenure (Defendant's reply Ex. D pgs. 9-14, 57-59). More importantly, he testified that he made the decision to place the 1994 model year work with Pine River in 1992. This work involved production of a right-hand meter hood assembly. According to Mr. Harada this work was awarded to Pine River was because it was already satisfactorily making the left-hand meter hood assembly. Id. at 78-80. Thus, Pine

River already had experience making the part and only had to change the symmetry. Id. at 78-80, 96. In addition, Mr. Harada considered both of the companies excellent in quality, delivery and cost. Id. at 23, 68-70. Mr. Harada also testified that although he received input from Mr. Shinoda, his sales engineer, the decision was his and his alone. Id. at 9-14, 78-80.

Thus, it is Mr. Harada's sworn testimony that he, and he alone, made the decision to award the 1994 work to Pine River because it was already making the left hand version that part, and he considered both Pine River and Grand Rapids to be excellent companies; similar in quality, delivery and cost. Id. at 23, 68,71, 78-80, 96-97. Moreover, Mr. Harada also states that Lakian never gave him

anything of value, and Plaintiff's has no evidence indicating otherwise. Id. at 35-36.

The affidavit of Mr. Shinoda, supports the testimony of Harada and Hiromitsu. Mr. Shinoda was employed by Daikyo-Decoma from 1987 until 1993 as the company's engineering manager. (Defendant's reply brief Ex. B). Thereafter he was employed by DDM when they succeeded Daikyo-Decoma. While at Daikyo-Decoma, Mr. Shinoda was responsible for reviewing and evaluating quotations from suppliers and making recommendations to his supervisor -- Mr. Hiromitsu up to 1990 and thereafter Mr. Harada. Mr. Shinoda further states that all decisions regarding the sourcing of work were made by Mr. Hiromitsu or his successor Mr. Harada, and that these decisions

were based only on an evaluation of the quality, efficiency, delivery, and prices of Grand Rapids Plastics and Pine River. Id. According to Mr. Shinoda, at no time either before or after Lakian resigned in 1990, did Lakian participate in, or influence, any of the decisions made by Daikyo-Decoma regarding which vendors would supply its products, or which vendors would be awarded work. Id. Lastly, Mr. Shinoda's affidavit states that he has never been paid any money by Lakian, nor received anything of value from him, and Plaintiff has no evidence to indicate otherwise. Id.

Third, even assuming Lakian possessed the influence Plaintiff suggests following his resignation in 1990 -- contrary to the evidence and testimony described above, Plaintiff has presented

no evidence that Lakian actually exerted such influence thereby causing Pine River to be awarded the work in lieu of Grand Rapids Plastics.

Thus, Plaintiff's evidence offers speculation and innuendo, but it does not present the Court with a genuine issue of material fact such that a reasonable juror could find that the failure to be awarded the work in 1992 or 1994 was due in part to Lakian's influence in connection to bribes or illegal payments. Moreover, other evidence directly refutes these claims. Just because Plaintiff bid on and lost the 1994 and 1998 work, it does not follow that the cause of that was an improper reason such as Lakian's influence or alleged bribery. The principals charged with deciding the placement of Daikyo-Decoma work at Pine river testified that

Lakian had no influence over the decision to place work, either before or after he resigned. The Court is not convinced a genuine issue of fact exists that Lakian had the ability to influence the 1994 and 1998 work, or that he actually did so.

In sum, the evidence does not show that Lakian had influence over the placement of the 1994 and 1998 model year work, or that he exerted any influence. There is also an absence of evidence that Lakian's agreement with Chapman involved the 1994 or 1998 work. Accordingly, because there is no evidence tending to prove that Lakian actually influenced, or bribed, the placement of the 1994 or 1998 work, Plaintiff has not established that the loss of that work was a overt act or a continuing violation for the purpose of the statute of

limitations, or a violation at all. The injury to Plaintiff's business was the award of work in 1989 and 1990, in connection with the alleged kickback scheme, therefore, the cause of action accrued then.

Lastly, Plaintiff attempts to extend the statute of limitations by arguing that its case falls within the other rule from Zenith Radio Corp, which provides that in regards to damages that have not yet been suffered or are too speculative to be ascertained at the time plaintiff's business is injured, the limitations period does not begin to run until the damages are ascertainable. Zenith Radio Corp. v. Hazeltine Research. Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 806 (1971).

Because the rule is in avoidance of the statute of limitations, "the party seeking the benefit

of them has the burden of proof to establish them. All presumptions are against him, since his claim to exemption is against the current of the law and is founded on exceptions." Akron Presfrom Mold Co.. v. McNeil Corp., 496 F.2d 230, 233 (6th Cir. 1974).

There is no evidence which tends to prove that Plaintiff suffered any damages incapable of proof within four years after the overt act committed in 1990. Plaintiff argues that as of July 1990, Grand Rapids Plastics could not have anticipated that there would be 1994 or 1998 model year programs, much less that they would lose the awards because of bribes. Therefore, the damages associated with these programs fall into the speculative damage exception. However, Plaintiff misses the point. As discussed at length above, the

overt acts were committed in 1990 and that is when the damage occurred and statute of limitations began to accrue. Moreover, there is no indication that the damages were speculative in 1990 regarding the 1992 work. Plaintiff argues that the 1992 work --awarded in 1990 -- remained uncertain until 'releases' were issued by Daikyo-Decoma to Pine River. According to the Plaintiff, only after these releases were issued was Daikyo-Decoma bound to make payment. The Court is not convinced. The purchase order for the work was issued in August of 1990, and clearly there was an indication of the dollar amount of work awarded, and hence the alleged damage was determinable. Thus, Plaintiff could have reasonably ascertained their damages and presented proof of them from issuance of the

purchase orders issued in 1989 and August 1990. As the Sixth Circuit has said in regards to the speculative damage exception:

> [A Plaintiff's] own projections and their actual experience during four years of operation would have been sufficient to provide the factfinder with a reasonable basis for calculating their damages. If they felt that they could not present sufficiently exact evidence of damages within that time, they could have filed suit and requested a stay.... They act at their risk in waiting until the statute of limitations had run and the district court correctly determined that they action was barred.

Kabealo v. Huntington National Bank, 17 F.3d 822, 827 (6th Cir. 1994); See also, Brunswick Corp. v. Reigel Textile Corp., 753 2 F.2d 261, 271 (7th Cir. 1984)(unless special circumstances exist that make plaintiff's damages excessively speculative, statute of limitations not tolled to determine the precise amount).

Applying the foregoing principles, the Court concludes that Plaintiff did not carry its burden of proving that its losses were so speculative so as to fall within the speculative damage exception of Zenith, supra.

Accordingly, for the reasons stated above, the Court finds that because Plaintiff's suit was not filed until June 26, 1996, more than four years after the overt act and injury to Plaintiff's business, it is barred by the statue of limitations. Although neither Lakian nor Pine River Plastics briefed the statute of limitations issue, the Court finds as a matter of law that Plaintiff's claim as to them is also barred by the statute of limitations.

B. Tortious Interference

Plaintiff has alleged a state law claim of tortious interference with a business relationship and/or expectancy against both Pine River and Chapman. Because the Court has disposed of Plaintiff's federal claim above, it is within the authority, and discretion, of the Court to dismiss Plaintiffs state law claim for lack of jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966)(if the federal claims are dismissed before trial, the state claims should be dismissed as well). Musson Theatrical. Inc.. v. Federal Express Corp., 89 F.3d 1244 1254 (6th Cir. 1996); 28 U.S.C. 1367(c). However, in the interest of judicial economy the Court will address Plaintiffs state law claim.

In order to establish a claim for tortious interference under Michigan law, a plaintiff must show:

> (1) the existence of a valid business relation or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Paradata Computer Networks, Inc. v. Telebit Corp., 830 F.Supp. 1001, 1007 (E.D.Mich. 1993)(quoting Michigan Podiatric Medical Ass'n v. National Foot Care Program, Inc., 175 Mich.App. 723, 735 (1989)).

In addition, the interference must be shown to have been improper, in that it was "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law...." Id.

An examination of these factors reveals that Plaintiff has failed to put forth evidence creating a genuine issue of material fact as to the existence of a valid business relation or expectancy. Because the Court finds this first factor dispositive, the other factors will not be addressed.

The first requirement for a tortious interference claim is that there be a valid business relation or expectancy. In this case, Plaintiff alleges that a kickback scheme began in 1989 when Lakian and Chapman agreed to split commissions Chapman would receive on work placed with Pine River. The transfer work and the 1992 work were awarded to Pine River in 1989 and 1990 respectfully -- before Grand Rapids Plastics was approached regarding that portion of the 1992 work Pine River had turned

down. Accordingly, Grand Rapids Plastics did not have a relationship with Daikyo-Decoma prior to being awarded a portion of the 1992 work.

In support of its claim, Plaintiff argues that "when Grand Rapids Plastics knew of, and bid for [in mid-1990], Daikyo-Decoma work, there was a realistic 'business expectancy,' and by far the lion's share of Defendants' bribes were paid after that time." (Plaintiff's response p.33). The Court is unable to ascertain the significance of this fragmented statement. The statement fails to explain what Grand Rapid's realistic business relation or expectancy was prior to, or after, mid-1990 and its bid for that part of the 1992 work Pine River turned down.

Plaintiff's argument seems to be that it held a valid expectation of business simply because it was a qualified supplier in the business of plastic injection molding. However, a mere subjective expectation of work is not enough to satisfy the factor of a valid expectancy. Trepel v. Pontiac Osteopathic Hospital, 135 Mich. App. 361, 377 (1984) ("The expectancy must be a reasonable likelihood or probability, not mere wishful thinking."). Moreover, if simply being a qualified competitor in the business at issue were enough to satisfy the element of a valid business expectancy then the requirement would be so broad as to be meaningless. Plaintiff has not established that it was even aware of Daikyo-Decoma, or the work they had available, much less that it had a reasonable

likelihood or probability of business prior to being approached to perform the 1992 work turned down by Pine River.

Lastly, Plaintiff argues that if it did not have an business expectancy it was because the Defendants prevented it from establishing one through a rigged bidding process. The only authority Plaintiff cites to is a case involving Pennsylvania law. There is no such authority in Michigan law and the Court finds it unpersuasive as it is factually distinguishable. In Advanced Power Systems v. Hi-Tech Systems, 801 F. Supp. 1450, 1459 (E.D.Pa. 1992), the claimant alleged it was one of a limited number of approved contractors eligible to bid for the business at issue, but was harmed by a rigged bidding process. In the case at

bar there is no allegation that Plaintiff was but one of a limited number of contractors.

The Court finds as a matter of law that the Plaintiff has not brought forth sufficient evidence to create a genuine issue of material fact regarding a valid business relationship, or the expectancy of one, prior to the 1989 agreement between Chapman and Lakian to split the commissions on Dailyo-Decoma work awarded to Pine River. Thus, Plaintiff's claim for tortious interference fails against each of the Defendants.

V. CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED that Defendants' motions for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/
Hon. Lawrence P. Zatkoff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GRAND RAPIDS PLASTICS, INC.,
a Michigan Corporation,

Plaintiff,

CASE NO. 96-CV-7361 5-DT

vs. HON. LAWRENCE P. ZATKOFF

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC., a Michigan
Corporation, PINE RIVER PLASTICS, INC.,
a Michigan Corporation, jointly and severally,
_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the
United States Courthouse, in the City of
Detroit, State of Michigan, on the
13 th day of May, 1998.

PRESENT: THE HONORABLE
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is before the Court on Plaintiff's motion for reconsideration of the Court's Memorandum Opinion and Order granting Defendants' motion for summary judgment. In addition, the Defendants have filed a motion for sanctions. For the reasons that follow, Plaintiff's motion for reconsideration is DENIED. Defendants' motion for sanctions is also DENIED.

Under E.D. Mich. Local R. 7.1 (h), a motion for reconsideration (1) must be filed no later than 10 days after entry of the challenged order, (2) must not present the same issues previously relied upon, and (3) must

demonstrate a palpable and outcome-determinative defect by which the Court and the parties were misled. Motions for reconsideration which merely present the same issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted. Id.

This case involved a claim of alleged commercial bribery. The Court issued a lengthy written opinion sufficiently setting forth the facts and legal basis for the Court's ruling and will not repeat it in detail here. In sum, the Court held that the Plaintiff's Claim was barred by the applicable statute of limitations because Plaintiff's suit was not filed

until four years after the alleged overt act and injury to Plaintiff's business. Specifically, the Court held that the overt act(s) was the award of the transfer and 1992 model year work, awarded in 1989 and 1990 respectively, and that there was no evidence that the alleged scheme encompassed work awarded thereafter. On reconsideration, Plaintiff claims that the Court's ruling was premised upon an incorrect factual conclusion, mainly that the alleged bribery scheme extended to work awarded to the Defendant in 1992 and 1994 respectively, and not just to the transfer and 1992 model year work. Thus, according to the Plaintiff, their claim is within the statute of

limitations.[1] The Court disagrees.

In support of its position that the alleged scheme extended beyond work awarded in 1989 and 1990, the Plaintiff cites a portion of the deposition testimony of Craig Lakian. In that testimony, Lakian states that his agreement with Chapman extended to work after the transfer and the 1992 model year work. However, although the Plaintiff does not continue the quote of Lakian's testimony beyond that which is favorable to its position, the testimony goes on and is consistent with the Court's findings that the evidence indicates Lakian only received continued payments

[1] Plaintiff filed suit on June 26, 1996.

based on the original award of the transfer and 1992 work, awarded in 1989 and 1990 respectively:

Q. Mr. Chapman was not in the practice of just gifting [sic] you money, right?

A. That's correct.

Q. He gave you money in accordance with agreements that you had concerning business dealings that you had together, right?

A. In accordance with agreements, yes.

Q. And business dealings you had together?

A. We had together.

Q. And one of those business dealings was a business dealing concerning work done by Pine River for Daikyo-Decoma, right?

A. Correct.

Q. And those business dealings extended back to 1990, right?

A. Correct.

Q. And specifically, one of those business dealings concerned an agreement under which Mr. Chapman agreed to pay you moneys [sic] based on work that Pine River secured from Daikyo-Decoma on the 1992 model year work, right?

A. Correct.

Q. And your understanding with Mr. Chapman extended to other model years where Pine River for Daikyo-Decoma, right?

A. I don't know if our verbal agreement extended to future model years. When you say future model years, you mean the major remodel change or do you mean consecutive years?

Q. I mean modification to the 1992 model year program. Such as the hood meter assembly that was modified for the 1994 model year?

A. Then the answer to your question would be yes.

Q. All right. And that agreement was in place from the time that the 1992 model year work was launched in 1992 up through 1996, right?

A. 1996. Approximately.

(1/30/97 Deposition of Lakian, pg. 23-25) (emphasis added).

Thus, consistent with the Court's previous findings, Lakian's testimony indicates that the payments were a continuation of the 1992 work, which was awarded in 1990. Because the 1992 work continued through 1996 the payments were "not new and independent acts that

inflicted a new injury, but rather, merely a reaffirmation, or unabated inertial consequence, of the previous agreement...." (Memorandum Opinion and Order, pg. 10).

Furthermore, the testimony of Chapman, the man who was paying Lakian a portion of his commission, contradicts any claim that the agreement encompassed work other than the 1992 model year work (Memorandum Opinion and Order pg. 12). Moreover, in addition to a lack of evidence that the payments involved work beyond the 1992 model year, the Court detailed at length in its written opinion the lack of evidence indicating that Lakian had any

influence over the actual placement of Daikyo-Decoma work after he left its employ in 1990 (Id. at pp. 12-18). All of the officers of Daikyo-Decoma responsible for placing the work testified that Lakian was not involved and did not influence the placement of work to Defendant Pine River. It was the sworn testimony that they, and they alone, made the decisions awarding the work. Neither is there any evidence Lakian was paying anyone at Daikyo. There is simply no evidence that Lakian had influence over, or did in fact influence, the placement of work to Defendant Pine River after 1990, in exchange for payments from Chapman. Thus, even

assuming Lakian did receive payments on later model work, the Plaintiff ignores the Court's finding of a lack of evidence involving a bribery scheme in relation to the 1994 and 1998 work.

As the Court found in its written opinion, there is no evidence that Lakian received payments for the alleged placement of work beyond the 1992 model year work, awarded in 1990. Moreover, there was no evidence that Lakian had the ability to influence, or did influence, the placement of such work after his departure from Daikyo-Decoma in 1990.

Therefore, for the reasons stated above, and after throughly reviewing the Plaintiff's motion, the Court finds the current motion presents the same issues previously relied upon and does not expose an outcome-determinative defect of the previous ruling. Moreover, the motion does not demonstrate that the Court was misled. Accordingly, Plaintiff's motion for reconsideration is DENIED.

The Court has also has before it Defendants' motion for sanctions. After reviewing the motion and considering all the facts and circumstances of this case, the Court finds that the case does not warrant the

imposition of sanctions. Accordingly,

Defendants' motion for sanctions is DENIED.

IT IS SO ORDERED.

/s/
Hon. Lawrence P. Zatkoff

Supreme Court, U.S.
FILED
FEB 15 2000
CLERK

(2)

No. 99-1232

IN THE
SUPREME COURT OF THE UNITED STATES

GRAND RAPIDS PLASTICS, INC.
Petitioner,

vs.

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC.,
and PINE RIVER PLASTICS, INC.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS JAMES CHAPMAN and H&L ENGINEERING, INC. IN OPPOSITION

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24pp

COUNTER QUESTIONS PRESENTED FOR REVIEW

1. The petitioner has not demonstrated compelling reasons to grant a writ of certiorari. The Petitioner seeks review of the circuit court's decision affirming the dismissal of petitioner's antitrust claim because the statute of limitations had run. The errors asserted by petitioner consist only of alleged erroneous factual findings and the misapplication of properly stated rules of law.

2. The Petitioner has made misstatements in its petition regarding the proceedings below. The correction of these misstatements further demonstrates that petitioner's application is without merit.

3. The courts below properly applied this Court's controlling decision in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971) to dismiss petitioner's tardy antitrust claim.

THE PARTIES

Respondent James Chapman is an individual resident of the State of Michigan. Respondent H&L Engineering, Inc. is a Michigan corporation wholly owned by Respondent Chapman.

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COUNTER STATEMENT OF THE CASE

INTRODUCTION

There are no special or important reasons for granting petitioner's request for writ of certiorari. The issues presented do not involve a conflict of authority in the lower courts. The decision below was based upon the application of settled principles of law to the particular facts of this case. The circuit court's decision does not concern important questions of federal law unsettled by this Court, and does not conflict with decisions of other United States courts of appeals or relevant decisions of this Court.

Moreover, the petition makes misstatements of fact and law. Petitioner asserts, as if it were undisputed, that respondents paid or received "bribes" and "kickbacks". To the contrary, respondents presented unrefuted testimony from all the alleged participants denying that any such illegal conduct took place. Petitioner never presented the trial court with any direct evidence of bribes or kickbacks, but simply argued that it was entitled to infer their existence from circumstances it labelled suspicious. Nor did Petitioner plead, or present any evidence, that the "bribery scheme" alleged in its complaint to have occurred in 1989, mutated or "expanded" over time, even though this argument is the foundation for its claims of error in its petition to this Court.

Petitioner now argues that it was prevented from proving the "expansion" of the alleged "bribery scheme"

to acts occurring inside the limitations period. In making this argument Petitioner misstates the record and the holding of the Sixth Circuit below. Contrary to petitioner's assertion, it never alleged that respondents made any new or continuing agreements to pay illegal commissions for work awarded after 1990. Instead, Petitioner argued below that since Respondent Chapman had split his commissions with Respondent Lakian until 1995 for the work awarded in 1989 and 1990, each new payment from Chapman to Lakian was a fresh violation of the antitrust laws. Before now, Petitioner never argued that after 1989 respondents ever made any new agreement to split commissions. No evidence of any such new agreement was ever presented.

The Sixth Circuit never "acknowledged that Petitioner may be able to establish a nexus between the 1994 and 1998 model year awards and the concurrently paid bribes." Petition for Writ at 11-12. The only thing the Sixth Circuit acknowledged was petitioner's argument (in the face of direct evidence to the contrary by person who awarded the work) that the earlier alleged bribes smoothed the way for the later bribe-free award of work to its competitor:

> "Although Grand Rapids does not allege that Chapman and Lakian entered any agreement regarding the 1994 work or the 1998 work, it argues that a jury could infer that the money paid to Lakian for the 1989 and 1992 work also insured that Pine River would receive the 1994 and 1998 work. Nevertheless, even if

> Grand Rapids offered evidence at trial that allowed the jury to make this inference, Grand Rapids's subsequent failure to obtain the 1994 and 1998 work, awarded in 1992 and 1994, respectively, does not start the statute of limitations running. "For statute of limitations purposes, the focus is on the timing of the causes of injury, i.e. the defendant's overt acts, as opposed to the effects of the overt acts." [*DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462 (6th Cir. 1996)] at 467. Grand Rapids's failure to obtain the 1994 or 1998 work, if in fact a result of the commission payment scheme, merely constitutes an effect of the overt act, i.e. the payment scheme, and therefore does not restart the statute of limitations." Petition for Writ at appendix 7.

The Sixth Circuit's decision affirming the dismissal of Petitioner's complaint was correct. The award of later work to Respondent Pine River, assertedly as the result of commissions paid on the earlier work, does not amount to a new and independent act by respondents, and does not fall within the "continuing violation" exception to the statute of limitations.

The Sixth Circuit also correctly dismissed Petitioner's claims against Respondent Lakian even though he never raised the statute of limitations as a defense or filed a motion for summary judgment. The other respondents did raise this defense, and did move for summary judgment. Petitioner was "on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S.

317, 326 (1986). Indeed, Petitioner does not now suggest what difference it would have made if Lakian had also raised the statute of limitations defense, or how it would have responded differently to a motion for summary judgment made by Lakian. The Court should also note that Petitioner never raised this argument in the trial court, despite filing a motion for reconsideration of the dismissal of all its claims.

Reasons For Denying the Writ

I. Petitioner Has Failed to Demonstrate Why the Petition for Writ Should be Granted, and This Case Does Not Merit the Court's Review

A Petition for Writ of Certiorari should explain to this Court the important reasons why review should be granted. Petitioner fails to make the required showing. It simply asserts that the Sixth Circuit properly stated, but misapplied, this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). It complains that the Sixth Circuit rejected its argument that each payment from Respondent Chapman/H&L to Respondent Lakian was an independent wrongful act that started the statute of limitations running. Nowhere does Petitioner even attempt to articulate any reason for this Court to exercise its supervisory power over this case.

The Petition for Writ makes two arguments. Petitioner argues that the Sixth Circuit misapplied the "continuing

violation" doctrine in dismissing its hypothetical claim that alleged bribes before the limitations period may have influenced the later award of work inside the limitations period. In the courts below Petitioner did not allege or offer any evidence that respondents had made any agreements or paid bribes regarding the 1994 or 1998 work. Instead Petitioner argued that the money paid to Respondent Lakian for the 1989 and 1992 work also insured that Respondent Pine River would receive the 1994 and 1998 work, by predisposing the buyer to favor Pine River. As noted by the trial court and the Sixth Circuit, Petitioner presented no proofs of this claim, which was never pleaded and was raised for the first time in response to the motion for summary judgment. Petition for Writ at appendix pp. 7, 29-56. Petitioner argued below that "a jury could infer" that the earlier payments "influenced" the later award of work. Now Petitioner argues that the courts below ignored its proofs regarding "the expansion of the bribery scheme to new programs," Petition for Writ at 8. In fact it presented no such proofs. To the contrary, Respondents presented substantial *unrefuted* evidence that no bribery or influence peddling ever occurred.

Petitioner's arguments below were based on the notion that each alleged "bribe" payment caused it separate injury. Petitioner cited no case to support this contention. The district court and the circuit court both rejected this argument, pointing out that the *timing* of the payments was not the cause of injury. If there was any

injury, it happened when the supposed *purpose* of the "scheme" was accomplished: the 1989 and 1990 award of work to Respondent Pine River, and not to Petitioner. The Sixth Circuit fully analyzed the point:

> "Grand Rapids argues that each payment to Lakian, which continued through 1995, was an independent wrongful act that started the statute of limitations running. However, even if the payment agreement constituted a continuing violation of the Robinson-Patman Act, the individual payments to Lakian were only a manifestation of the previous agreement. The individual payments therefore do not constitute a "new and independent act," as required to restart the statute of limitations." Petition for Writ at appendix 6. (internal citation omitted).

Additionally, Petitioner asserts that its claim against Respondent Lakian should not have been dismissed because Lakian never pleaded the statute of limitations as an affirmative defense, and therefore waived it. Petition for Writ at 19-20. Petitioner never mentions this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), cited by the Sixth Circuit, in which this Court pointed out that a district court may enter summary judgment *sua sponte*, "so long as the losing party was on notice that she had to come forward with all her evidence." *Id.* at 326. The summary judgment motions filed by Lakian's co-defendants seeking dismissal of Petitioner's complaint under the statute of limitations, an argument which applied to all of Petitioner's claims against all the defend-

ants, put Petitioner "on notice to come forward" with all its evidence to oppose the motions. Petitioner presented everything it could to avoid dismissal. It does not explain what it would have done differently if Lakian had amended his affirmative defenses and filed his own motion for summary disposition. Nor does Petitioner explain how *Celotex* is inapplicable.

II. Petitioner Has Misstated the Facts of the Case and The Proceedings Below

Petitioner misstates the facts and law of the case. Respondent is required by Supreme Court Rule 15.2 to point out any perceived misstatement made in the Petition.

No Evidence of Bribes or Kickbacks

Throughout it Petition, Petitioner refers to "bribes" and "kickbacks" as if their existence were undisputed facts. This is not the case. The district court found Petitioner's bribery case had no direct factual support, and was contradicted by substantial unrebutted evidence submitted by respondents:

> "[I]n addition to a lack of evidence that the payments involved work beyond the 1992 model year, the Court detailed at length in its written opinion the lack of

> evidence indicating that Lakian had any influence over the actual placement of Daikyo-Decoma work after he left its employ in 1990. (*Id.* at pages 12-18). All of the officers of Daikyo-Decoma responsible for placing the work testified that Lakian was not involved and did not influence the placement of work to Defendant Pine River. It was the sworn testimony that they, and they alone, made the decisions awarding the work. Neither is there any evidence that Lakian was paying anyone at Daikyo. There is simply no evidence that Lakian had influence over, or did in fact influence, the placement of work to Defendant Pine River after 1990, in exchange for payments from Chapman." Petition for Writ at appendix pp. 78-79.

The respondents submitted deposition testimony and affidavits from all the persons employed at Daikyo-Decoma whom Petitioner had identified as subject to Lakian's "influence." Every one of these persons denied that Lakian, or anyone else, influenced their decisions about where to place work. Every one of these persons denied that they had been bribed. Every one of these persons affirmed that they awarded work both to Petitioner Grand Rapids Plastics and to Respondent Pine River Plastics solely on the basis of free, fair and open assessment of the capabilities and experience of the companies, the quality of the work, and the prices quoted. Petition for Writ at appendix pp. 49-53. Petitioner did not present any evidence of any payments to anyone at Daikyo-Decoma.

No Evidence That Petitioner's Bid Was "More Competitive"

Petitioner asserts at page 5 of its Petition for Writ that "its bid on the 1998 model year work was more competitive" than Respondent Pine River's. There is no record evidence to support this assertion. Petitioner never submitted any evidence showing either its bid on the 1998 work, or Pine River's bid on the 1998 work. No evidence was ever submitted by any party comparing the bids submitted for the 1998 work by Pine River and Grand Rapids, or analyzing whether one was more "competitive" than the other. There is evidence on the record, however, that *all* the work awarded by Daikyo-Decoma, whether to Pine River of to Grand Rapids, was done so on the basis of "an evaluation of the quality, efficiency, delivery, and prices of Grand Rapids Plastics and Pine River." Petition for Writ at appendix 53. The record does not support the assertion that Petitioner's bid was "more competitive."

Petitioner Was Not Recognized as a Higher Quality Supplier

Petitioner also asserts at page 5 of its Petition for Writ that "it was recognized as a higher quality provider" than Respondent Pine River. The district court described this assertion as an "exaggeration." Petition for Writ at appendix 44. The record evidence shows that both companies were considered equal in quality. In rejecting Petitioner's assertion of superior quality, the district court noted:

"Mr. Harada, head of Daikyo-Decoma from 1990 to 1994 and the person responsible for choosing suppliers, testified that both companies were 'excellent in quality, delivery and cost.'" Petition for Writ at appendix pp. 44-45. Petitioner was not "recognized" as a higher quality supplier than Pine River.

No Proof of Abnormal Procedures in Awarding 1998 Work

In yet another misstatement at page 5 of its Petition, Petitioner states that "a Daikyo-Decoma employee, Doug Clements" testified about abnormal bid evaluation procedures for the award of the 1998 work by Daikyo-Decoma. In fact, Clements never worked for Daikyo-Decoma. Daikyo-Decoma was out of business when the 1998 work was awarded. Clements worked for DDM Plastics, a different company. He did not work for Daikyo-Decoma, and had no knowledge of anything that happened there. Moreover, in response to a question from Petitioner's counsel about the award of the 1998 work, Clements testified that he did not have "any factual information" that DDM Plastic's award of work to Pine River was due to bribery. Petition for Writ at appendix 46. There is no evidence of abnormal bid procedures in the award of the 1998 model year work.

Lakian Was Not Paid "Bribes"

Petitioner states at page 6 of its Petition that "Lakian was actually paid bribes on the 1990 transfer work, the 1992 model year work, and the 1994 model year work." The facts of record are different. Chapman split with Lakian the commissions he earned from Pine River for the 1990 transfer work and the 1992 model year work. Respondents have contested that this splitting of commissions was "bribery" because Lakian did not make or influence the decision to select Pine River as a vendor to Daikyo-Decoma. See, Petition for Writ at appendix pp. 49-53, where the district court explained that Lakian had no decision-making authority at Daikyo-Decoma, and that all the persons who had authority denied both that Lakian had any input into the decision to select Pine River, and that anyone had bribed or improperly influenced them. Nevertheless, Petitioner has persisted in describing the split commissions as "bribes." In addition, Petitioner conceded in the trial court that it had no evidence of any payments to Lakian or anyone else regarding the 1994 model year work by anyone, regardless of what label might be attached.

> "[I]t is not alleged, nor is any evidence presented that Lakian received, or was scheduled to receive, any monies from Chapman, through Pine River, involving the award of the 1994 and 1998 model year work..." Petition for Writ at appendix pp. 38-39.

The facts are that Lakian received *commissions* for the

1990 transfer work and the 1992 model year work; he received *nothing* for the 1994 model year work.

Lakian Was Not "Slated to Receive Additional Bribes"

Petitioner states at page 6 of its Petition for Writ that Lakian "was slated to receive additional bribes" after 1994. Aside from the disputed characterization of the commission payments as "bribes," there is no record evidence to support this assertion. No witness testified and no document referred to any "slating," plan, intent or desire to make "additional" payments, however labelled, to Lakian.

Lakian Did Not Bribe Shinoda

Petitioner asserts that the "bribes" Lakian received were "funnelled" to a Daikyo-Decoma employee named Shinoda. Petition for Writ at 6. However, the district court carefully reviewed the record for evidence of such payments and concluded that the "allegation that Lakian had influence over Daikyo-Decoma work because he was bribing Mr. Shinoda, and/or others is purely speculative." Petition for Writ at appendix 41. After reviewing Petitioner's attempts to create a fact issue on this point, the district court concluded:

"These 'facts' are insufficient to establish, or even

> create an issue of fact, that Lakian was bribing Shinoda, or anyone else at Daikyo-Decoma, or had influence over the placement of the 1994 and 1998 work." Petition for Writ at appendix 43.

Lakian did not bribe Shinoda, or anyone else.

Lakian Did Not Solicit a "Bribe" From Blackstone

Petitioner states that "Lakian solicited a similar bribe from Blackstone in 1992. Blackstone refused." Petition for Writ at 7. These statements misrepresent the record. In fact, Lakian "solicited" a commission payment from Blackstone (Petitioner's executive vice president, not president as stated in the Petition) for work awarded to Petitioner more than a year earlier. Petition for Writ at appendix 47. Blackstone had no objection to paying the commission Lakian requested, provided that Lakian signed on as Petitioner's representative. Petitioner now characterizes this as a request for a "bribe." The circuit court discussed this point in detail:

> In February 1992, Fred Blackstone, Executive Vice President of Grand Rapids, met with Lakian to discuss the possibility of a job. Blackstone stated in his deposition that at the meeting, Lakian demanded payment of commissions on the work he had brought Grand Rapids. Blackstone testified that Lakian told him that he needed a commission to pass on to Daikyo-Decoma's engineering manager, Steve Shinoda.

> Blackstone refused to pay *unless Lakian signed a written agreement to be a Grand Rapids manufacturer's representative*. According to Blackstone, Lakian threatened that if Grand Rapids did not pay the commissions, they would not get any more work from Daikyo-Decoma. Despite the threat, Grand Rapids did almost four million dollars worth of business with Daikyo-Decoma in 1992 under a new contract for production of a rear finisher for which Pine River was not asked to bid. Petition for Writ at appendix 4 (emphasis added).

Not only did Lakian not solicit a "bribe" from Blackstone, Blackstone did not refuse to pay. Blackstone was ready to pay Lakian a commission for the Daikyo-Decoma work, if Lakian signed a manufacturer's representation agreement.

Petitioner's Argument That the Alleged Bribery Scheme "Expanded" is a New Claim

Petitioner argues that the circuit court held that "the expansion of the bribery scheme to new programs" was not an overt act restarting the statute of limitations. Petition for Writ at 8. The circuit court did not make such a holding. Petitioner's argument is based on a false premise. Petitioner never pleaded, argued or presented evidence, that the alleged bribery scheme "expanded." Petitioner's "expansion" theory first appeared in its

Petition for Writ. Not only did the courts below never hear this theory, but there is no evidence on the record to support it. At no time did the circuit court make any holding about "expansion of the bribery scheme," let alone that the "expansion" had any effect on the running of the statute of limitations.

III. The Sixth Circuit Properly Affirmed the Dismissal of Petitioner's Antitrust Claim Because the Statute of Limitations Had Run

A. Petitioner's Claim For Violation Of Section 2(c) Of The Robinson-Patman Act Was Barred By The Statute Of Limitations

The circuit court ruled correctly that Petitioner's Robinson-Patman claim was barred by the statute of limitations. The claim alleged by Petitioner accrued in 1990. Because it did not file its §2(c) claim until 1996, the claim was barred.

1. §2(c) of the Robinson-Patman Act

Section 2(c) of the Robinson-Patman Act provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage,

> or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. 15 U.S.C. §13(c).

2. *The Limitations Period for Antitrust Actions Is Four Years*

Section 4B of the Clayton Act sets a four year statute of limitations for private antitrust actions. 15 U.S.C. §15b. The limitations period begins to run when the cause of action accrues, that is, when the plaintiff suffers injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1971) ("Generally, a cause of action accrues and begins to run when a defendant commits an act that injures a plaintiff's business....[E]ach time a plaintiff is injured by an act of the defendant, a cause of action accrues to him to recover the damage caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.")

Petitioner's Robinson-Patman claim was based on an alleged "scheme of bribery." Petitioner claimed in its complaint that the scheme began when Chapman and Lakian negotiated an agreement to split Chapman's commissions from Pine River for the Daikyo-Decoma work. This happened in 1989.

3. Petitioner's Claims Accrued in 1990

Petitioner alleged in its complaint that Daikyo-Decoma awarded work to Pine River because of the commission-splitting agreement between Chapman and Lakian. The wrong Petitioner claimed to have suffered was the loss of Daikyo-Decoma's business. This loss of business took place in 1989 and 1990 when Daikyo-Decoma awarded the transfer work and the 1992 model year work to Pine River. The "last overt act" causing injury or damage to Petitioner was complete when Daikyo-Decoma issued its purchase order to Pine River in August 1990 for the 1992 model year work. The circuit court affirmed the trial court's conclusion that the four year statute of limitations had expired in 1994, and that as a consequence, Petitioner's 1996 complaint was too late.

B. The "Continued Wrongful Acts" Exception Does Not Apply

Petitioner sought to extend the statute of limitations deadline by arguing that respondents had committed "continued wrongful acts" inside the limitations period.

Petitioner pointed out that Chapman/H&L had continued to pay Lakian through 1995, and argued that the continued payments were "wrongful acts" inside the limitations period. The circuit and district courts correctly rejected this argument. The *payments* from Chapman to Lakian did not cause injury to Petitioner, regardless of when they were made. Petitioner's claim was that its injury was caused by the *award of business* to Pine River. Petitioner did not claim that it, and not Lakian, was entitled to a share of the commissions, or that the commissions themselves caused it injury. The "wrongful act" was the diversion of business from Grand Rapids to Pine River. The *dates* that Pine River made payments to Chapman or that Chapman made payments to Lakian were immaterial to Petitioner's claim. The fact that Chapman paid money to Lakian in 1995 on an agreement made in 1989 did not "restart the clock" for the limitations period.

Petitioner did not satisfy its burden to demonstrate that its claims, which were barred by the applicable statutes of limitations on their face, fell within any exception. The circuit court and district court correctly ruled that Petitioner's Robinson-Patman claims were barred.

Conclusion

The Petition for Writ should be denied. This case does not merit consideration by the Court. The fact-driven decision of the Sixth Circuit correctly applied settled principles of law to affirm the dismissal of Petitioner's complaint because the statute of limitations had run.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 99-1232

In The

Supreme Court of the United States

GRAND RAPIDS PLASTICS, INC.,

Petitioner,

vs.

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC.
and PINE RIVER PLASTICS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT PINE RIVER PLASTICS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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15pp

QUESTION PRESENTED

Whether the District Court properly granted Respondents' motions for summary judgment dismissing Petitioner's complaint as not being brought within the applicable limitation period established by 15 U.S.C. § 15b, when commission sharing payments, although continuing until 1995, were in consummation of certain challenged agreements between Respondents Lakian and Chapman made in 1989 and 1990 (more than four years preceding Petitioner's complaint), which agreements related to the issuance (in 1989 and 1990) of purchase orders from Daikyo-Decoma (not a party to this action) to Respondent Pine River for the manufacture of automotive parts.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Pine River Plastics, Inc. is a Michigan corporation. It has no corporate parent, no subsidiaries and no publicly held company owns more than 10% of its stock.

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STATEMENT OF THE CASE

Respondent Pine River Plastics, Inc. adopts the "Counter Statement of the Case" set forth in the Brief in Opposition to Petition for Writ of Certiorari Filed by Respondents James Chapman and H&L Engineering.

REASONS FOR DISMISSING OR DENYING THIS PETITION

The Decisions of the District Court and the Court of Appeals Do Not Conflict with Applicable Law Discussing the Application of the Statute of Limitations in Robinson-Patman Act Cases

The primary basis urged by Petitioner as to why its petition should be granted is that certain commission sharing payments made by Respondent Chapman to Respondent Lakian extending into 1995 constitute new and independent overt acts occurring within the statute of limitations period established by 15 U.S.C. § 15b, thus resulting in continuing violations of the Robinson-Patman Act and permitting Petitioner to maintain this cause of action. However, both the District Court and the Court of Appeals for the Sixth Circuit recognized that the overt acts involved here were the award by Daikyo-Decoma to Pine River Plastics of certain purchase orders for automotive parts to be manufactured by Pine River and sold to Daikyo-Decoma. The purchase orders were issued in 1989 (as to the "transfer work") and in 1990 (as to the "1992 model year work"). Pine River's independent manufacturer's sales representative, Chapman (doing business as H&L Engineering), agreed (again no later than 1990) to split commission payments on the "transfer work" and

the "1992 model year work" with Craig Lakian who, it is alleged, had the ability to direct the award of the purchase orders by Daikyo-Decoma to Pine River. Deliveries of product pursuant to the two purchase orders continued into 1995, and commissions were paid by Pine River to Chapman during that period. Upon receipt of each commission, Chapman shared a portion of it with Lakian. Both of the allegedly offending purchase orders were issued more than four years prior to the institution of this suit.

Petitioner argues that the continued payment of commissions, and the sharing of those commissions between Chapman and Lakian (such sharing occurring within four years prior to commencement of suit), constitute new and independent overt acts which avoid the application of the Robinson-Patman Act's four-year statute of limitations. However, all authority cited by Petitioner is inapposite and can be distinguished.

Petitioner relies heavily on *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir. 1986). On page 15-16 of the petition filed in this action Petitioner states that the Ninth Circuit "held the illegal kickbacks paid after the statute expired restarted the limitations clock; characterizing the payments themselves as 'overt acts.' [citing *Hennegan, supra*]" This mischaracterizes the holding of the Ninth Circuit in *Hennegan* (*supra* at 1300-1301), wherein the court states that the "payments by the souvenir vendors to the tour operators *and the tour operators' shepherding of tourists away from the Hennegans' shop and to the shops of the souvenir vendors*" (emphasis supplied) constitute the overt acts. Plaintiff in *Hennegan* had argued that the practice of the tour operators in steering tourists

to the souvenir shops which made illegal payments to the tour operators constituted a continuing violation of the antitrust laws. The souvenir shops continued to make payments to the tour operators and the tour operators continued to steer tourists to those shops, to the exclusion (and damage) of the plaintiffs in *Hennegan*. Hence the Ninth Circuit correctly held that each payment, *coupled with the steering of tourists away from plaintiffs' shop*, constituted overt acts within the meaning of the statute of limitations provisions of the relevant antitrust laws. In the case here, the purchase orders were awarded in 1989 and 1990, Petitioner lost the work at that time, and the damage was complete at that time. The fact that sharing of commissions arising from the 1989 and 1990 purchase orders occurred thereafter does not restart the limitations clock. There is no allegation in this case that Daikyo-Decoma could move the "transfer work" or the "1992 model year work" from time to time from manufacturer to manufacturer. The decision regarding the work, and the damage (if any) to Petitioner, was complete no later than 1990.

Hennegan, supra, is cited in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1996) cited by Petitioner. The Ninth Circuit in *Columbia* discusses *Hennegan* and states that *Hennegan* involved a situation where the "limitations period restarted each time tour guides sheparded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy [sic] between tour operators and other vendors" (*Columbia, supra* at 1445). Thus the required overt acts to restart the limitations period were again characterized by the Ninth Circuit as the steering of tourists away from plaintiffs'

shop. The payments themselves, as erroneously characterized by Petitioner in its brief, do not constitute sufficient overt acts to restart the statute of limitations.

A review of the facts in *Columbia, supra,* establish that the court there was faced with a similar situation. In this Sherman Act case, Portland General Electric Co. wrote a letter refusing to "wheel power" for Pacific Power & Light Co. in a situation involving the providing of electric service to Columbia. The refusal of Pacific to "wheel power" was alleged to be a violation of the Sherman Act. Additional alleged violations had occurred more than four years prior to the commencement of suit, and the issue facing the Ninth Circuit was whether the 1990 refusal of Portland, referenced above, was an overt act sufficient to extend the statute of limitations. The Ninth Circuit held that it was. This is much different from what Petitioner would have this court hold, namely that the mere payment of money in furtherance of the earlier overt act of issuing purchase orders to Respondent Pine River instead of Petitioner extends the statute of limitations.

The holding of the District Court and the Court of Appeals in this case is directly in accord with key authority on this issue, and in particular *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996). As stated in *Zenith, supra* at 339:

> Thus if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, the cause of action immediately accrues to him to recover all damages incurred by that date and

> all provable damages that will flow in the future from the acts of the conspirators on that date.

Here the overt act involved was the issuance of the purchase orders in 1989 and 1990. At that time Grand Rapids Plastics was damaged, as it failed to receive the necessary and prerequisite orders for the "transfer work" and the "1992 model year work." The fact that the specific automotive parts were to be manufactured and shipped over time upon the issuance of periodic "releases" does not change the situation. Daikyo-Decoma could only issue the releases to Pine River pursuant to the 1989 and 1990 purchase orders. The *fact* of damage to Petitioner was complete in 1990. The calculation of the *amount* of damage would extend beyond 1990, but such does not restart the limitation period. Courts are faced each day with numerous situations involving projection and calculation of future damages. The number of automobiles to be produced in the future, and therefore the number of parts to be sold by automobile suppliers to the OEM manufacturers is one of the easiest calculations to be made. Each day the media contains projections as to such matters. Future damages in this instance are not speculative. Here the fact of damage was established, the amount of damage to the date of trial is certain, and only the amount of damage beyond trial need be projected. Suit should have been brought prior to four years following the issuance of the 1990 purchase order. Suit was not so brought, and hence the decisions of the lower courts in this case are correct and should stand.

DXS, supra, holds the same. In *DXS,* defendant announced a policy of refusing to deal with vendors other than authorized sales representatives. However,

defendant did not follow up on the policy, but delayed for some time before communicating with certain hospitals and advising them that the policy would be enforced. The subsequent statements to the hospitals, announcing that the policy would thereafter be enforced, were considered by the Sixth Circuit to be new and independent acts which restarted the statute of limitations. In the case at bar, the purchase orders were issued in 1989 and 1990. Daikyo-Decoma's decisions as to their supplier were final as of that time. There was not a hiatus between the announced intent to issue the purchase orders, and the actual issuance of the purchase orders, which would make the case analogous to *DXS, supra*.

Other cases cited by Petitioner are similar and support the well-reasoned opinions below. Petitioner cites *Twin City Sportservice, Inc. v. Charles O. Finley Company, Inc.*, 512 F.2d 1264 (9th Cir. 1975). *Twin City* is a Sherman Act case involving allegations of actual monopolization. The conduct involved was a long-term concession contract at a sports arena, and defendant urged that the suit should be dismissed inasmuch as the statute of limitations had expired, arguing that the limitation period began on the date that the contract was last extended, which date was more than four years prior to the institution of suit. Inasmuch as monopolization was alleged, the Ninth Circuit held, citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that the case dealt with "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm." (*Twin City, supra* at 1270). *Twin City* continued to allegedly monopolize the concession activity at the sports arena every time there was an event. In the

case at bar there are only two acts which are alleged to be violative of the Robinson-Patman Act, and those are the issuance of purchase orders in 1989 and 1990 which awarded certain automotive contracts to Respondent Pine River, rather than to Petitioner. The damage occurred at that point in time, even though the sharing of commissions extended into the future. Contrary to the facts in *Twin City, supra,* and *Hanover Shoe, supra,* the situation here is a single act occurring at a specific point in time. Consequently *Twin City, supra,* can be easily distinguished and actually supports the proposition urged by Respondent in this case.

Petitioner further cites *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975). In *Poster Exchange,* the court was faced with a continuing refusal to deal, a Sherman Act violation. Defendant refused to supply plaintiff with certain accessory materials relating to the motion picture distribution industry. The refusal to deal was ongoing and continued well beyond the initial failure to provide the involved accessories. Citing *Hanover Shoe, supra,* the Fifth Circuit distinguished between a solitary act in violation of the antitrust laws, and a continuing conspiracy whereby the offending party continues, on day-to-day basis, to take action (in that case a refusal to deal) which causes ongoing damage to the complainant. In the case at bar, not only was Petitioner awarded purchase orders from Daikyo-Decoma for automotive parts since the earlier criticized purchase orders of 1989 and 1990 but Petitioner has failed to connect later purchase orders issued to Respondent Pine River with any illegal act in violation of the antitrust laws. A continuing violation is not involved here, nor any

Sherman Act monopolization allegation. Try as it will, Petitioner cannot tie in any way the issuance of the 1989 and 1990 purchase orders, accompanied by the sharing of commissions, to the issuance of purchase orders for the 1994 and 1998 model year work, which were not accompanied by any commission sharing whatsoever and which occurred during the same time period as the issuance of other purchase orders by Daikyo-Decoma to Petitioner. Again the situation in the case at bar is far different from the situation presented to this court in *Hanover Shoe, supra,* which involved a continuing practice of refusing to sell shoe manufacturing machinery to the plaintiff on a continuing basis over a number of years. None of the other cases cited by Petitioner in its brief supports the proposition that new and independent overt acts occurred after 1990 which would restart the statute of limitations.

The only argument raised by Petitioner that new and independent overt acts occurred since the issuance of the 1989 and 1990 purchase orders is the argument that in some unspecified way the payments by Chapman to Lakian arising out of the earlier purchase orders influenced Daikyo-Decoma to award purchase orders to Pine River in connection with the "1994 model year work" and the "1998 model year work." Both of these later purchase orders were issued within four years prior to the commencement of suit. In the same time period that it issued these later purchase orders, Daikyo-Decoma also issued purchase orders for certain work to Petitioner, Grand Rapids Plastics. Petitioner fails to set forth any link between the payments from Chapman to Lakian and the award of the 1994 and 1998 work. Certain facts are,

however, quite clear. Lakian ceased employment with Daikyo-Decoma in 1990, and after that date there is no evidence that he had any ability to influence the decisions of Daikyo-Decoma in connection with the issuance of purchase orders. In fact, there is no direct evidence of any link between the payments from Chapman to Lakian resulting from the earlier purchase orders, and the issuance of the later purchase orders. No authority has been cited by Petitioner which comes close to permitting the trial court to engage in the type of speculation urged here.

The Sixth Circuit correctly analyzed Petitioner's claim when it stated: "Grand Rapids does not allege that Chapman and Lakian entered any agreement regarding the 1994 work or the 1998 work" *Grand Rapids Plastics, Inc. v. Lakian, et al.*, 188 F.3d 401, 406 (6th Cir. 1999). Consequently the illegal act, if it occurred, occurred in connection with the award of the 1989 and 1990 purchase orders. The Sixth Circuit in effect adopted the following reasoning of the district judge: "However there is no evidence from which a reasonable juror could find that Grand Rapids' failure to obtain the 1994 or 1998 work was due to an antitrust violation" (District Court Opinion; Petitioner's Appendix at 37-38). The District Court further states that: "First, it is not alleged, nor is any evidence presented, that Lakian received or was scheduled to receive any monies from Chapman, through Pine River, involving the award of 1994 and 1998 model year work; work which the Plaintiff bid on but was not awarded." (District Court Opinion; Petitioner's Appendix at 38). This is not a situation of a continuing violation or continuing refusal to deal, as in most authority cited by

Petitioner. The injury, if it occurred at all, occurred in 1989 and 1990. Both the District Court and the Court of Appeals properly found in favor of Respondents and their conclusion should not be reversed.

CONCLUSION

For the above reasons, Respondent Pine River Plastics, Inc. requests that this petition be either dismissed or denied, for the reason that the four year statute of limitations has expired, and that no independent overt acts have occurred within the limitation period to permit Petitioner's claim to succeed under applicable law.

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